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Cortesía del estudiante fundador Dr. Alfredo Fuentes Roldán.



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Rector: Doctor Fernando Ponce León, SJ.
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QUITO, ECUADOR

2020

Centro de Publicaciones de la Pontificia Universidad Católica del Ecuador
Quito, Ecuador
www.edipuce.edu.ec

Responsabilidades

El equipo de gestión editorial tiene a su cargo la Dirección/Coordinación Técnica de la RFJ y se encuentra conformado por:

1. El director/a editor/a

2. Las/los coordinadoras/es editoriales

El equipo de gestión editorial/técnica tiene a su cargo las labores de gestión y coordinación administrativa de los procesos editoriales de la Revista RFJ. No participa como evaluadoras/es y/o revisores/as, es decir, del proceso *blind peer review* (sistema de pares a <<doble ciego>>). Este proceso es llevado a cabo de

forma exclusiva por los miembros del Consejo Editorial y del Comité Editorial y de Evaluadoras/es Externas/os (quienes son en todos los casos académicas/os y/o profesionales investigadoras/es con filiación externa a la PUCE). Su responsabilidad es organizar el proceso de gestión administrativa de los textos remitidos a la revista. Por lo tanto, ninguno de sus miembros es responsable de determinar el carácter de publicable de los artículos desde una perspectiva científica. Sin embargo, pueden someter al Consejo Editorial casos de infracción a las reglas de juego que orientan los procesos de la RFJ.

2) CONSEJO EDITORIAL

Miembros

Responsabilidades

El Consejo Editorial tiene a su cargo supervisar el proceso editorial y la calidad científica de la Revista RFJ. En ese sentido, puede emitir recomendaciones orientadas a perfilar a la RFJ como un producto de excelencia internacional. De manera excepcional, sus miembros pueden participar como evaluadoras/es y/o revisores/as, es decir, del proceso *blind peer review* (sistema de pares a <<doble

ciego>>). Sin embargo, su asignación (organizada a través del equipo de gestión editorial) se realiza dentro de lineamientos que apuntan a la total transparencia e imparcialidad. En caso de participar evaluadoras/es y/o revisores/as se inhiben de realizar opiniones o funciones que puedan implicar afectación del código de ética de la revista y/o criterios establecidos por la PUCE, el CACES u otras entidades competentes. Son en todos los casos (100%), académicas/os-profesionales con filiación externa a la PUCE.

3) COMITÉ EDITORIAL Y DE EVALUADORAS/ES EXTERNAS/0S

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Dr. Hugo Cahueñas Muñoz. Docente de la Universidad San Francisco de Quito (Quito, Ecuador).

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Dr. Jaime Vintimilla Saldaña, PhD. Docente titular de la Universidad San Francisco de Quito (Quito, Ecuador).

Evaluadores Externos

Dra. Natalia Almeida Oleas, LLM. Estudio Pérez, Bustamante & Ponce (Quito, Ecuador).

Dr. Mauricio Arosemena Romero, PhD. Estudio Romero Menéndez (Guayaquil, Ecuador).

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Dr. Andrés Chong Qui Toris, LLM. Estudio Novoa, Peña y Torres (Guayaquil, Ecuador).

Dr. Francisco Santiago Larrea Naranjo, LLM. Estudio Noboa, Peña & Torres (Quito, Ecuador).

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Dra. Gabriela Rodríguez Morejón, LLM. Estudio Noboa, Peña y Torres Abogados (Guayaquil, Ecuador).

Dr. Félix Reyes Chévez, LLM. Estudio Coronel & Peréz (Guayaquil, Ecuador).

Dra. María Lorena Ortiz, LLM. Estudio Bustamante & Bustamante (Quito, Ecuador).

Mgtr. Paulina Valle Segura, Investigadora UCE

RESPONSABILIDADES DEL COMITÉ EDITORIAL Y DE LAS/LOS EVALUADORAS/ES Y/O EVALUADORAS/ES Y/O REVISORES/AS EXTERNAS/OS:

El Comité Editorial y de evaluadoras/es y/o c externas/os; en su condición de pares externos, cumplen con el rol de asegurar criterios de calidad en los contenidos y de objetividad en la selección y publicación, dentro del proceso editorial. Con este objeto se les atribuyen las siguientes responsabilidades:

1. Rol de revisores/as o arbitraje

Toda persona natural que se encarga de revisar de manera anónima, voluntaria, solidaria y profesional, según arreglo de las formas utilizadas en la academia, acepta valorar manuscritos con temas en los cuales tiene capacidad y competencia para emitir criterio experto. En todo momento, esta revisión y el dictamen seguirán las pautas establecidas por la revista RFJ, ajustándose a sus normas editoriales:

http://www.revistarfjpuce.edu.ec/index.php/rfj/about/submissions

2. Conflicto de intereses

En caso de existir un conflicto de intereses, de cualquier índole, las personas naturales con responsabilidades de revisión se comprometen a informar a la revista RFJ de inmediato, en cualquier momento del proceso y a rechazar su participación como revisor.

3. Confidencialidad

Las personas naturales con responsabilidades de revisión deben respetar el contenido de cada texto en proceso de arbitraje y lo mantendrán en condición confidencial durante todo el proceso editorial. En ese sentido, la RFJ emitirá reconocimientos/certificados una vez concluido el proceso editorial y publicado el número respectivo.

4. Retroalimentación

Toda crítica al artículo se realizará en forma anónima, objetiva, honesta y respetuosa para con el autor, quién podrá realizar las correcciones o ajustes correspondientes, según lo solicitado por la revista RFJ. En caso de no aceptar el arbitraje, el artículo será rechazado.

5. Modalidad de arbitraje

Los artículos emitidos por los autores son enviados a los pares revisores externos, bajo el sistema de *blind peer review* (sistema de pares a <<doble ciego>>). Este sistema de evaluación de los trabajos de investigación consiste en que al menos dos expertos (pudiendo ser más de dos de requerirlo el proceso de evaluación del texto) en la materia sobre la que tratan los evalúan y emiten un dictamen sobre la vialidad de la publicación.

6. Responsabilidades del Comité Editorial y de las/los Evaluadoras/es Externas/os

Junto con el Consejo Editorial, el Comité Editorial y de las/los Evaluadoras/es Externas/os vela por mantener el perfil académico de la revista en su ámbito de reflexión, en el objeto de estudio al cual responde y en relación con la audiencia a la cual se dirige.

7. Competencia

Junto con el Consejo Editorial, los miembros del Comité Editorial y de las/los Evaluadoras/es Externas/os, son los únicos responsables para determinar el carácter de publicable de los artículos desde una perspectiva científica.

Gestión ténico-administrativa de la revista

Diseño y Diagramación:

Ing. Mariana Lozada Mondragón

Contacto: mlozada685@puce.edu.ec

Ing. Amparo Álvarez Meythaler

Contacto: adalvarez@puce.edu.ec

* Docentes titulares de la Facultad de Arquitectura, Diseño y Artes (FADA-PUCE).

Srta. Rachel Romero Medina

Contacto: rcromero@puce.edu.ec

* Colaboradora principal de diagramación.

COPE - CÓDIGO DE CONDUCTA Y MEJORES PRÁCTICAS DIRECTRICES PARA EDITORES DE REVISTAS

Antecedentes / estructura

El Código de Conducta COPE para Editores de Revistas está diseñado para proveer de un conjunto de estándares mínimos al que se espera que todos los miembros de COPE se adhieran. Las Directrices sobre las *Mejores Prácticas* son más ambiciosas y se desarrollaron en respuesta a las peticiones de orientación por parte de los editores sobre una amplia gama de cuestiones éticas cada vez más complejas. Aunque cope espera que todos los miembros se adhieran al Código de Conducta para los Editores de Revistas (y considerará la presentación de reclamaciones contra los miembros que no lo hayan seguido), somos conscientes de que los editores pueden no ser capaces de implementar todas las recomendaciones de *Mejores Prácticas* (que son voluntarias), pero esperamos que nuestras sugerencias identifiquen aspectos en relación con la política y las prácticas de la revista que puedan ser revisados y discutidos.

En esta versión combinada de los documentos, las normas obligatorias que integran el Código de Conducta para los Editores de Revistas se muestran en letra redonda y con cláusulas numeradas; por otra parte, las recomendaciones en relación con las *Mejores Prácticas* aparecen en cursiva.

Deberes y responsabilidades generales de los editores

Los editores deben ser responsables de todo lo publicado en sus revistas. Esto significa que los editores deben:

1. Tratar de satisfacer las necesidades de los lectores y autores;

2. Esforzarse para mejorar constantemente su revista;

3. Establecer procesos para asegurar la calidad del material que publican;

4. Abogar por la libertad de expresión;

5. Mantener la integridad del historial académico de la publicación;

6. Impedir que las necesidades empresariales comprometan las normas intelectuales y éticas; y,

7. Estar siempre dispuesto a publicar correcciones, aclaraciones, retracciones y disculpas cuando sea necesario.

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Buscar activamente las opiniones de los autores, lectores, revisores y miembros del Consejo Editorial sobre cómo mejorar los procesos de la revista;*
- *Fomentar y conocer las investigaciones sobre la revisión por pares y publicar y reevaluar los procesos seguidos por la revista a la luz de estos nuevos hallazgos;*
- *Trabajar para persuadir al editor de la publicación para que proporcione los recursos apropiados, así como la orientación de expertos (por ejemplo, diseñadores, abogados);*
- *Apoyar iniciativas diseñadas para reducir las malas conductas en relación con la investigación y la publicación;*
- *Apoyar iniciativas para educar a los investigadores sobre la ética de las publicaciones;*
- *Evaluar los efectos de la política de la revista sobre el comportamiento del autor y del revisor y revisar las políticas, en caso necesario, para fomentar un comportamiento responsable y desalentar la puesta en práctica de malas conductas;*
- *Asegurar que los comunicados de prensa emitidos por la revista reflejan fielmente el mensaje del artículo sobre el que versan y ponerlos en contexto.*

Relaciones con los lectores

1. Se debe informar a los lectores sobre quién ha financiado la investigación u otro trabajo académico, así como sobre el papel desempeñado por el financiador, si este fuera el caso, en la investigación y en la publicación.

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Velar por que todos los informes y las revisiones de la investigación publicados hayan sido revisados por personal cualificado (incluyendo revisiones estadísticas cuando sean necesarias);*
- *Garantizar que las secciones no revisadas por pares de la revista están claramente identificadas;*

- *Adoptar procesos que fomenten la exactitud, integridad y claridad de los informes de investigación, incluida la edición técnica y el uso de directrices y listas de verificación apropiadas (por ejemplo,* miame*,* consort*);*

- *Considerar el desarrollo de una política de transparencia para fomentar la divulgación máxima de los artículos que no son de investigación;*

- *Adoptar sistemas de autoría o contribución que promuevan buenas prácticas, es decir, que reflejen quién realizó el trabajo y desmotiven la puesta en práctica de malas conductas (por ejemplo, autores fantasmas y autores invitados); y,*

- *Informar a los lectores sobre las medidas adoptadas para garantizar que las propuestas presentadas por los miembros del personal de la revista o del Consejo Editorial reciben una evaluación objetiva e imparcial.*

Relaciones con los autores

1. Las decisiones de los editores de aceptar o rechazar un documento para su publicación deben basarse en la importancia, originalidad y claridad del artículo, en la validez del estudio, así como en su pertinencia en relación con las directrices de la revista;

2. Los editores no revocarán las decisiones de aceptar trabajos a menos que se identifiquen problemas graves en relación con los mismos;

3. Los nuevos editores no deben anular las decisiones tomadas por el editor anterior de publicar los artículos presentados, a menos que se identifiquen problemas graves en relación con los mismos;

4. Debe publicarse una descripción detallada de los procesos de revisión por pares y los editores deben estar en disposición de justificar cualquier desviación importante en relación con los procesos descritos;

5. Las revistas deben tener un mecanismo explícito para que los autores puedan apelar contra las decisiones editoriales;

6. Los editores deben publicar orientaciones para los autores sobre todos aquellos aspectos que se esperan de ellos. Esta orientación debe actualizarse periódicamente y debe hacer referencia o estar vinculada al presente código;

7. Los editores deben proporcionar orientación sobre los criterios de autoría y / o quién debe incluirse como colaborador siguiendo las normas dentro del campo pertinente.

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Revisar las instrucciones de los autores regularmente y proporcionar enlaces a las directrices pertinentes (por ejemplo, icmje: Publicación de investigación responsable: Normas internacionales para los autores);*

- *Publicar intereses contrapuestos relevantes en relación con todos los colaboradores y publicar correcciones si dichos intereses se revelan tras la publicación ;*

- *Asegurar que se seleccionan revisores apropiados para los artículos presentados (es decir, individuos que pueden valorar el trabajo y no son capaces de rechazarlo por intereses contrapuestos);*

- *Respetar las peticiones de los autores de que un evaluador no revise su trabajo, siempre que estas estén bien razonadas y sean posibles;*

- *Guiarse por los diagramas de flujo de COPE (http:// publicationethics.org/ flowcharts) en casos de sospecha de mala conducta o de controversia en la autoría;*

- *Publicar información detallada sobre cómo se gestionan los casos de sospecha de mala conducta (por ejemplo, con vínculos al diagrama de flujo de COPE);*

- *Publicar las fechas de entrega y aceptación de los artículos.*

Relaciones con los revisores

1. Los editores deben proporcionar orientación a los revisores sobre todo lo que se espera de ellos, incluyendo la necesidad de manejar el material enviado en confianza con confidencialidad; esta orientación debe actualizarse periódicamente y debe hacer referencia o estar vinculada al presente código;

2. Los editores deben exigir a los revisores que revelen cualquier posible interés contrapuesto antes de revisar un trabajo;

3. Los editores deben contar con sistemas que garanticen la protección de las identidades de los revisores, a menos que utilicen un sistema abierto de revisión, del que han sido informados tanto los autores como los revisores.

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Alentar a los revisores a realizar comentarios sobre cuestiones éticas y posibles acciones de mala conducta en relación con la investigación y la publicación identificadas en los trabajos presentados (por ejemplo, diseño de investigación poco ético, detalles insuficientes sobre el consentimiento de los pacientes del estudio o sobre la protección de los sujetos de la investigación incluidos los animales-, manipulación y presentación inadecuada de los datos, etc.);*
- *Animar a los revisores a realizar comentarios sobre la originalidad de los trabajos presentados y a estar alerta de las posibles publicaciones repetidas y del plagio;*
- *Considerar la posibilidad de proporcionar a los revisores herramientas para detectar publicaciones relacionadas (por ejemplo, vínculos a referencias citadas y búsquedas bibliográficas);*
- *Enviar los comentarios de los revisores a los autores en su totalidad a menos que sean ofensivos o difamatorios;*
- *Favorecer el reconocimiento de la contribución de los revisores a la revista ;*
- *Alentar a las instituciones académicas a reconocer las actividades de revisión por pares como parte del proceso académico;*
- *Realizar un seguimiento de la labor desempeñada por los evaluadores y tomar medidas que aseguren un proceso de alta calidad;*
- *Desarrollar y mantener una base de datos de revisores adecuados y actualizarla en función del rendimiento de los mismos;*
- *Dejar de enviar trabajos a revisores que emiten, de forma constante, críticas carentes de educación, de mala calidad o fuera de plazo;*
- *Asegurar que la base de datos de revisores es un reflejo de la comunidad académica para la revista y añadir nuevos revisores si resulta necesario;*
- *Utilizar una amplia gama de fuentes (no solo contactos personales) para identificar nuevos posibles revisores (por ejemplo, sugerencias de los autores, bases de datos bibliográficas);*
- *Seguir el diagrama de flujo de COPE en casos de sospecha de mala conducta por parte del revisor.*

Coordination Unit: Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador

EDITORIAL COMMITTEE

1) Editorial Management Team

Management / Technical Coordination:

Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador.

Contact: rfj@puce.edu.ec

Director and/or Editor:

Dr. Rubén Carlos Braulio Méndez Reátegui, PhD – Dsc

Contact: rcmendez@puce.edu.ec

Editorial Coordinator:

Dr. Ivonne Tellez Patarroyo

Contact: itellez783@puce.edu.ec

Editorial Coordinator:

Mg. Gonzalo Lascano Báez

Contact: gglascano@puce.edu.ec

EDITORIAL MANAGEMENT TEAM

RESPONSIBILITIES

The editorial management team is in charge of the Direction/Technical Coordination of the RFJ and is made up of:

a) The director/editor

b) The editorial coordinators

The editorial/technical management team is in charge of the management and administrative coordination of the editorial processes of the RFJ Magazine. It does not participate as evaluators and/or reviewers, that is, in the blind peer-review process (double-blind peer system). This process is carried out exclusively by the members of the Editorial Board and the Editorial Committee and External Evaluators (who are in all cases academic and/or professional researchers with external affiliation to PUCE). Her responsibility is to organize the administrative management process of the texts sent to the magazine. Therefore, none of its members is responsible for determining the publishable

nature of articles from a scientific perspective. However, they may submit to the Editorial Board cases of infringement of the rules of the game that guide the RFJ processes.

2) Editorial Board

Members

Responsibilities

The Editorial Board is in charge of supervising the editorial process and the scientific quality of the RFJ Magazine. In this sense, it can issue recommendations aimed at profiling the RFJ as a product of international excellence. Exceptionally, its members can participate as evaluators and/or reviewers, that is, in the blind peer-review process ("double-blind" peer system). However, its allocation (organized through the editorial management team) is carried out within guidelines that aim at full transparency and impartiality. In the event that evaluators and/or reviewers participate, they are

inhibited from making opinions or functions that may imply affectation of the journal's code of ethics and/or criteria established by PUCE, CACES, or other competent entities. They are in all cases (100%), academic/professionals with external affiliation to PUCE.

3) Editorial and External Evaluators Commitee:

International Members

Dr. Alberto Muñoz Villarreal, PhD. Profesor de la Universidad Autónoma de Madrid (Madrid, España).

Dr. Alfredo Muñoz García, PhD. Profesor del Departamento de Derecho Mercantil y Director Adjunto y Coordinador del Máster Universitario en Acceso a la Profesión de Abogado de la Universidad Complutense de Madrid (Madrid, España).

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Dr. Paulino César Pardo Prieto, PhD. Catedrático de la Universidad de León (León, España).

Dr. Alberto Patiño Reyes, PhD. Profesor del Departamento de Derecho de la Universidad Iberoamericana (Ciudad de México, México).

Dr. Camilo Posada Torres, LLM. Profesor titular y Director de la Maestría en Derecho de la Empresa y de los Negocios de la Universidad de la Sabana (Bogotá, Colombia).

Dr. Gustavo Quintero Navas, PhD. Profesor titular de la Universidad de los Andes - Facultad de Derecho (Bogotá, Colombia).

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Dr. Alberto Ruiz Ojeda, PhD. Catedrático de la Universidad de Málaga (Málaga, España).

Dr. Fernando Rodríguez López, PhD. Profesor titular de la Universidad de Salamanca (Salamanca, España).

Dr. Carlos Rene Salinas Araneda, PhD. Profesor de la Pontificia Universidad Católica de Valparaíso (Valparaíso, Chile).

Dra. María Amparo Salvador Armendáriz, PhD. Profesora de la Universidad de Navarra (Navarra, España).

Dr. Rolando David Andrade Hidalgo, Mgtr. Docente titular principal de la UTPL (Loja, Ecuador).

Dra. Ana Jessenia Arteaga Moreira, LLM. Universidad San Gregorio de Portoviejo (Portoviejo, Ecuador).

Dr. Oscar Andrés del Brutto Andrade, LLM. Docente titular de la Universidad Espíritu Santo (Guayaquil, Ecuador).

Dr. Mario Francisco Cuvi Santacruz, LLM. Docente titular y Decano de la Facultad de Derecho y Gobernabilidad de la Universidad Ecotec (Guayaquil, Ecuador)

Dr. Darío Alcides Díaz Toledo, PhD. Docente titular principal de la UTPL (Loja, Ecuador).

Dr. Hugo Cahueñas Muñoz. Docente de la Universidad San Francisco de Quito (Quito, Ecuador).

Dr. Javier Coronel Zambrano, LLM.Socio del Estudio Jurídico Coronel & Cía.y docente de la Universidad Espíritu Santo (Guayaquil, Ecuador).

Dra. Silvana Esperanza Erazo Bustamante, PhD. Docente titular de la Universidad Técnica Particular de Loja. (Loja, Ecuador).

Dr. José Irigoyen Arboleda, PhD. Docente titular de la Universidad San Francisco de Quito (Quito, Ecuador).

Dra. Alegría Jijón Andrade, PhD. Docente de la Universidad de los Hemisferios y Estudio Peréz, Bustamante & Ponce (Quito, Ecuador).

Dra. María Alexandra López Paredes, Mgtr. Docente titular de la Universidad Técnica de Ambato (Ambato, Ecuador).

Dr. Juan Manuel Marchán Maldonado, LLM. Socio del Estudio Peréz, Bustamante & Ponce y docente de la Universidad San Francisco de Quito (Quito, Ecuador).

Dr. Andrés Martínez Moscoso, PhD. Docente titular de la Universidad de Cuenca (Cuenca, Ecuador).

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RESPONSIBILITIES OF THE EDITORIAL COMMITTEE AND THE EVALUATORS AND/OR EXTERNAL REVIEWERS:

The Editorial Committee and the evaluators and/or external reviewers; As external peers-reviewers perform the role of ensuring quality criteria in content and objectivity in selection and publication, within the editorial process. For this purpose, the following responsibilities are attributed to them:

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Any natural person who is in charge of reviewing anonymously, voluntarily, in solidarity and professionally, according to the forms used in the academy, agrees to assess manuscripts with topics in which they have the capacity and competence to issue an expert judgment. At all times, this review and the opinion will follow the guidelines established by the RFJ magazine, adjusting to its editorial standards:

http://www.revistarfjpuce.edu.ec/index.php/rfj/about/submissions

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Any criticism of the article will be made anonymously, objectively, honestly, and respectfully towards the author, who will be able to make the corresponding corrections or adjustments, as requested by the RFJ magazine. In case of not accepting the arbitration, the article will be rejected.

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6. Responsibilities of the Editorial Committee and the External Evaluators

Together with the Editorial Board, the Editorial Committee and the External Evaluators ensure the academic profile of the journal in its field of reflection, in the object of study to which it responds and in relation to the audience to which is directed.

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Technical-administrative management of the journal

Editorial assistants:

Miss Andrea Estefanía Iglesias Beltrán

Contact: aeiglesias@puce.edu.ec

Mr. Gabriel Suárez Jácome

Contact: jsuarez610@puce.edu.ec

Mrs. Lissangee Mendoza García

Contact: lmendoza000@puce.edu.ec

Design and layout:

Ing. Mariana Lozada Mondragón

Contact: mlozada685@puce.edu.ec

Ing. Amparo Álvarez Meythaler

Contact: adalvarez@puce.edu.ec

* Professors of the Faculty of Architecture, Design, and Arts (FADA-PUCE).

Mrs. Rachel Romero Medina

Contact: rcromero@puce.edu.ec

* Layout collaborator.

COPE CODE OF CONDUCT AND BEST PRACTICES GUIDELINES FOR JOURNAL EDITORS

Background / structure

The COPE Code of Conduct for Journal Editors is designed to provide a set of minimum standards to which all COPE members are expected to adhere. The Best Practice Guidelines are more ambitious and were developed in response to editors' requests for guidance on a wide range of increasingly complex ethical

issues. Although cope expects all members to adhere to the Code of Conduct for Journal Editors (and will consider filing complaints against members who have not followed it), we are aware that publishers may not be able to implement all recommendations. Best Practices (which are voluntary), but we hope that our suggestions identify aspects of the journal's policy and practices that can be reviewed and discussed.

In this combined version of the documents, the mandatory standards that make up the Code of Conduct for Journal Editors are shown in round type and with numbered clauses; on the other hand, recommendations regarding Best Practices appear in italics.

General duties and responsibilities of publishers

Editors must be responsible for everything published in their Journals. It means that publishers must:

1. Try to meet the needs of readers and authors;

2. Strive to improve the journal continually;

3. Establish processes to ensure the quality of the material they publish;

4. Advocate for freedom of expression;

5. Maintain the integrity of the publication's academic record;

6. Prevent business needs from compromising intellectual and ethical standards; and,

7. Always be willing to publish corrections, clarifications, retractions, and apologies when necessary.

Best Practices for publishers would include the following actions:

- Actively seek the opinions of the authors, readers, reviewers and members of the Editorial Board on how to improve the journal processes;
- Promote and learn about research on peer review and publish and re-evaluate the processes followed by the journal in light of these new findings;
- Work to persuade the publisher of the publication to provide appropriate resources as well as expert guidance (e.g., designers, lawyers);
- Support initiatives designed to reduce misconduct in relation to research and publication;
- Support initiatives to educate researchers about the ethics of publications;
- Evaluate the effects of the journal's policy on the behavior of the author

and the reviewer and review the policies, if necessary, to encourage responsible behavior and discourage the implementation of misconduct;

- Ensure that the press releases issued by the Journal faithfully reflect the message of the article they are about and put them in context.

Relations with readers

1. Readers should be informed of who has funded the research or other academic work, as well as the role, if any, of the funder in research and publication.

Best Practices for publishers would include the following actions:

- Ensure that all published research reports and reviews have been reviewed by qualified personnel (including statistical reviews when necessary);
- Ensure that the non-peer-reviewed sections of the journal are clearly identified;
- Adopt processes that promote the accuracy, completeness, and clarity of research reports, including technical editing and the use of appropriate guidelines and checklists (e.g., miame, consort);
- Consider developing a transparency policy to encourage maximum disclosure of non-research articles;
- Adopt authorship or contribution systems that promote good practices, that is, that reflect who did the work and discourage the implementation of misconduct (for example, ghostwriters and guest authors); and,
- Inform readers of the measures taken to ensure that proposals submitted by staff members of the Journal or Editorial Board receive an objective and impartial evaluation.

Relations with authors

1. Editors' decisions to accept or reject a document for publication must be based on the importance, originality, and clarity of the article, on the validity of the study, as well as on its relevance in relation to the journal's guidelines;

2. Editors will not reverse decisions to accept papers unless serious problems are identified in connection therewith;

3. New editors should not override decisions made by the previous editor to publish submitted articles unless serious issues are identified in relation to them;

4. A detailed description of the peer review processes should be published and the editors should be able to justify any significant deviations from the described processes;

5. Journals must have an explicit mechanism for authors to appeal against editorial decisions;

6. Editors should publish guidelines for authors on all aspects that are expected of them. This guidance must be regularly updated and must refer to or be linked to this code;

7. Editors should provide guidance on authorship criteria and/or who should be included as a contributor following standards within the relevant field.

Best Practices for publishers would include the following actions:

- Review authors' instructions regularly and provide links to relevant guidelines (eg icmje5, Responsible Research Publication: International Standards for Authors);
- Post relevant conflicting interests in relation to all contributors and post corrections if those interests are revealed after posting;
- Ensuring that appropriate reviewers are selected for the articles submitted (ie, individuals who can value the work and are unable to reject it for competing interests);
- Respect the authors' requests that an evaluator does not review their work, provided they are well reasoned and possible;
- Be guided by COPE flow charts (Http: // publicationethics.org/flowcharts) in cases of suspected misconduct or controversy in authorship;
- Publish detailed information on how suspected misconduct cases are handled (for example, with links to the COPE flow diagram);
- Publish the delivery and acceptance dates of the articles.

Relations with reviewers

- Editors should provide guidance to reviewers on what is expected of them, including the need to handle confidentially submitted material with confidence; this guidance should be regularly updated and should refer to or be linked to this code;
- Editors should require reviewers to disclose any potential conflicting interests before reviewing a paper;

- Editors should have systems in place to ensure the protection of reviewers' identities unless they use an open review system, which both authors and reviewers have been informed of.

Best Practices for publishers would include the following actions:

- Encourage reviewers to comment on ethical issues and possible misconduct actions in relation to the research and publication identified in the papers presented (eg unethical research design, insufficient details on the consent of study patients, or on the protection of research subjects, including animals, inappropriate handling and presentation of data, etc.);

- Encourage reviewers to comment on the originality of papers submitted and to be alert to possible repeat posts and plagiarism;

- Consider providing reviewers with tools to detect related publications (for example, links to cited references and bibliographic searches);

- Send the reviewers' comments to the authors in their entirety unless they are offensive or defamatory;

- Promote recognition of the contribution of the reviewers to the journal;

- Encourage academic institutions to recognize peer review activities as part of the academic process;

- Monitor the work of the evaluators and take measures that ensure a high-quality process;

- Develop and maintain a database of appropriate reviewers and update it based on their performance;

- Stop submitting papers to reviewers who consistently issue uneducated, poor-quality, or late reviews;

- Ensure that the reviewer database is a reflection of the academic community for the journal and add new reviewers if necessary;

- Use a wide range of sources (not just personal contacts) to identify new potential reviewers (eg, authors' suggestions, bibliographic databases);

- Follow the COPE flow chart in cases of suspected misconduct by the reviewer.

*El Equipo Editorial de la revista RFJ se encuentra integrado por los miembros del Equipo de Gestión Editorial, el Consejo Editorial y el Comité Editorial y de Revisoras/es Externas/os. El Consejo Editorial y el Comité Editorial y de Revisoras/es Externas/os asume la responsabilidad académica de la revista y se encuentra conformado exclusivamente por docentes e investigadores externos a la PUCE.

AVISO LEGAL

En atención del amparo legal que brinda el Art. 118 del Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación (Código Ingenios) del número 1 al número 6 de la revista se ha respetado el formato original de los documentos/artículos remitidos.

Esta revista se adscribe dentro de las actividades jurídico-investigativas realizadas por la Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador.

CUOTA DE GÉNERO

De manera transversal para todos sus órganos, procesos y productos/secciones, la RFJ intenta que esta no se sitúe por debajo del 25%.

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EDITORIAL

La Revista Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador (RFJ) es una publicación científica continua y semestral (Enero-Junio) (Julio-Diciembre) publicada por el Centro de Publicaciones y bajo el auspicio de la Dirección de Investigación de la Universidad. La modalidad de publicación continua cierra el 30 de junio y el 31 de diciembre de cada año. Sin embargo, la RFJ se encuentra abierta a recibir artículos a lo largo de todo el año. Su énfasis es el ámbito de lo jurídico y (entendido *prima facie* en un sentido teórico) su relación con otras disciplinas, saberes y ciencias. Puede utilizar el sistema de "especiales temáticos" en cualquiera de sus convocatorias.

En su segunda época, constituye un homenaje a la Revista inicial, publicada en 1999 y es resultado del invalorable apoyo recibido por parte del Dr. Íñigo Salvador Crespo y el Dr. Efrén Guerrero Salgado, ex decanos de la Facultad de Jurisprudencia, quienes, durante todo el proceso, actuó decididamente para facilitar las condiciones que permitieron el resurgimiento de la revista. A ellos debemos la portada y la aprobación final por parte de las unidades competentes que hicieron posible esta edición. La RFJ se edita en castellano, inglés, francés, italiano y portugués. Aborda temas desde una perspectiva exegética, multi y transdisciplinar. Por lo tanto, está dedicada al análisis crítico de la problemática nacional e internacional del Derecho en todas sus áreas. Incluye artículos de científico-jurídicos, revisiones, análisis de actualidad, investigaciones, recensiones de libros, notas de investigación, notas de revisión, informes, miscelánea y traducciones originales.

La propuesta editorial de la RFJse encuentra en el marco de la misión de la PUCE, y busca contribuir de un modo riguroso y crítico, a la tutela y desarrollo del Estado de Derecho, la dignidad humana y de la herencia cultural, mediante la investigación, la docencia y los diversos servicios ofrecidos a las comunidades locales, nacionales e internacionales.

El Consejo Editorial y de evaluadores externos está integrado por destacados académicos de las ciencias sociales de diferentes Universidades de Latinoamérica, Europa, Estados Unidos y Oceanía. Estos de forma conjunta al Equipo de Gestión Editorial conforman el Comité Editorial de la RFJ.

La Revista está abierta a la recepción de artículos durante todo el año, dentro de las fechas límites de cada uno de los números. Los documentos recibidos y seleccionados para publicación cumplirán con el sistema de revisión anónima por el sistema de «doble ciego» y las pautas reglamentarias establecidas.

Finalmente, se invita a todos los docentes e investigadores a que participen y compartan con nosotros futuras contribuciones.

Dirección Revista RFJ

A la Pontificia Universidad Católica del Ecuador

AGRADECIMIENTO Y PRESENTACIÓN

La Pontificia Universidad Católica del Ecuador como *alma mater* del conocimiento de las diversas disciplinas del saber, consciente que el núcleo fundamental de nuestra vivencia académica es la investigación y, por lo tanto, la promoción de espacios de participación para la producción científica, agradece:

Al equipo de investigación y publicaciones de la Facultad de Jurisprudencia. Al equipo de asistencia editorial conformado por Lissangee Stefanía Mendoza García, Rachel Carolina Romero Medina, Mariana Lozada Mondragón y Amparo Álvarez Meythaler.

A los revisores que actúan como pares ciegos verificadores de contenido y los lineamientos generales investigativos de la revista y la formulación y acoplamiento técnico de su estructura. A los autores que con su activa colaboración permiten el desarrollo de una investigación integral en el ámbito de la ciencia jurídica.

A la Dirección de Investigación y al Centro de Publicaciones por su invalorable apoyo durante el proceso de establecimiento y consolidación de la RFJ.

La RFJ representa un aporte original, fruto del trabajo coordinado de los miembros de la Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador y prestigiosos académicos internacionales.

El proyecto editorial surge a partir de la iniciativa de la Facultad de Jurisprudencia que con gran dedicación generó el espacio propicio de interacción y colaboración científica, que facilitó el arduo proceso de elaboración documental que esta publicación conllevará. Asimismo, la exhaustiva revisión y aprobación por parte de pares externos no se puede dejar sin mención.

Por lo tanto, se puede concluir que la RFJ introduce un elevado grado de originalidad y trascendencia para la literatura jurídica nacional e internacional y favorece a la sociedad ecuatoriana en su conjunto. En ese sentido, debo reiterar que, a través de esta revista, la Pontificia Universidad Católica del Ecuador y su Facultad de Jurisprudencia contribuye de modo incólume, con el progreso en la enseñanza del Derecho como disciplina científico-humanista.

Dr. Mario Melo Cevallos
Decano de la Facultad de Jurisprudencia
Pontificia Universidad Católica del Ecuador

ARTÍCULOS

SUMARIO DE LA REVISTA

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Intellectual Property in the 21st century in Ecuador

La Propiedad Intelectual del siglo XXI en Ecuador

Cynthia Mishel Gudiño Flores
Independent legal researcher
City: Ibarra
Country: Ecuador

Original article (research note)
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ABSTRACT: Intellectual Property is continuously present in different manifestations of daily life. However, not all people fully understand what this means, especially for authors of artistic or scientific creations, or for inventors. Given this scenario, it is essential to claim the role of the creator and its economic impact on society; in order to increase the incentives to materialize creative ideas of the human intellect that, inevitably, contribute to the production of science and culture.

KEYWORDS: royalties, patents, Intellectual property, economic and social development, creativity.

RESUMEN: La Propiedad Intelectual está constantemente presente en diferentes manifestaciones de la vida cotidiana. Sin embargo, no todas las personas comprenden íntegramente lo que esto significa, sobretodo, para los autores de creaciones de índole artística o científica, o para los inventores. Dado este escenario, es importante reivindicar el rol del creador y su incidencia económica en la sociedad; con el fin de otorgar un mayor número de incentivos a la materialización de ideas creativas del intelecto humano que, inevitablemente, contribuyen a la producción de ciencia y cultura.

PALABRAS CLAVES: derechos de autor, patentes, propiedad intelectual, desarrollo económico y social, creatividad.

INTRODUCTION

To deal with the subject of intellectual property is to enter, among others, the world of books, medicine, inventions, music, cinematography, television programs, and the radio. Every day people listen to music in the car on the way to work, read books, watch movies or videos, take medications, use a computer, or access a website. However, they do not always realize that the goods and services protected by the intellectual property are behind their simplest activities of daily life. Much less are they aware of the existence and needs of the creator of all these inventions and works, which imply a series of intellectual property rights?

In order to financially reward the effort to create goods and services, people are obliged to pay compensation for their daily use. Otherwise, there would be no motivation to continue investing time and money in works or inventions that will immediately go into the public domain without actually generating a direct economic benefit to its creator. (Bercovitz, 2015)

Although it is true, in the field of intellectual property protection, two high currents of thought are very well marked by different concepts. The basic idea of the first holds that inventions and creations of any kind should not be protected if they undermine the collective use that can be made of them. This position understands that intellectual property rights are below free access to goods and services. Therefore, it prioritizes their use and not the protection of those who created them. (Stiglitz, 2017)

On the other hand, the second trend indicates that as the author is the raw material for the creation of any work, he deserves to have an incentive that motivates him to continue externalizing forms of expression of knowledge. As intellectual property is the accumulation of culture, of its forms of generation and diffusion; and, above all, a sizeable active part of

the market, a space in which goods and services are exchanged, the continuous generation of knowledge is of importance and collective interest. (Antequera, 2007)

In this order of ideas, the present research article elucidates all the questions that arise regarding the economic impact of the protection of intellectual property at the national level, and the incentives that can be generated in innovation and generation. of knowledge through correct legislation and application of the patent and copyright regime.

1. PRELIMINARY CONSIDERATIONS

The concept of an author refers to the natural person who creates a work and that as a consequence, he has immediate intellectual property rights over it. Therefore, according to the thesis of the birth of the right along with that of the work. In this sense, the author is not only the original purchaser of the right, but also the exclusive full owner of the intellectual property. (Bercovitz, 2015)

According to the preliminary ruling 32-IP-97 of the Andean Community Court of Justice (1998), copyright is compatible with industrial property rights and, at the same time, independent of them. And vice versa. So, independence and compatibility can be simultaneous with the protection of the same intellectual property.

In this sense, the photographic memory of an industrial invention can qualify as a work in the field of copyright due to its original form of expression; An artistic manifestation can be useful to identify products or services typical of trademark law; and even, an original commercial motto could qualify as a literary work. (Antequera, 2007)

Then there is no discussion, but instead regarding the strength and extent of the protection granted to them. As previously noted, there are two firm and divergent theories regarding the protection of intellectual rights.

The first theory considers that it is a grave mistake to try to maximize profits for a few (understood authors and industries) instead of maximizing the community's development and well-being. He understands that market dynamics are changing, and that emerging economy has a responsibility to create a new intellectual property system that is fair and that recognizes the need for access to knowledge to achieve a community with optimal levels of development and growth.

The maxim of this posture is to achieve a recommended level of well-being in all people, ahead of corporate or personal profits or revenues. Hence, it follows that it does not attach importance to the production of knowledge if it is useful application is not allowed in various fields such as the doctor, the pharmacist, or the recreational. (Jayadev, 2017)

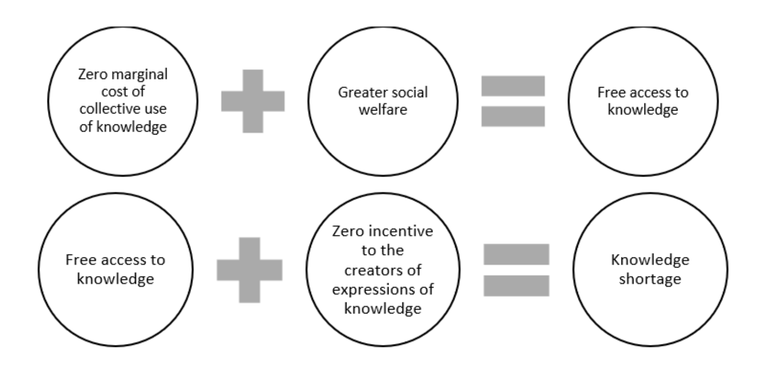
To clarify the meaning of this trend, patents, considered in the Ecuadorian legal system within the Organic Code of the Social Economy of Knowledge, Creativity, and Innovation (Ingenios Code, 2016), will be taken as a tool designed with the purpose to promote industrial and technological development to achieve adequate standards of good living. According to Baker (2017), within the developed position, the patent system is an awarding mechanism that prevents the correct flow of knowledge, minimizes the benefits or profits derived from the said award, and distorts the economy.

The solution, it is proposed, is an alternative that maximizes the flow of knowledge through a collective creative space such as open-source software. Since copyright is understood, and even more so, the patent system creates cognitive monopolies that prevent access to knowledge, the satisfaction of the primary needs of emerging markets, and health, placed on basic human needs.

The main problem, caused by strong positions and discussions at the global and internal levels, is the conception of knowledge as a public good that affects economic and social levels. The concern arises because the market chooses to

provide insufficient knowledge due to the lack of incentives for research purposes. (Diagram 1)

Diagram 1: Market, knowledge and the lack of incentives



Source: Bercovitz, R. (2015).

Prepared by Cynthia Gudiño

Throughout the entire previous century, the theory put forward indicates that it was thought that this market failure could be solved through another: private monopolies. The patents and all the intellectual rights belonging to the inventions, works, or creations were applied for this purpose. However, according to Stiglitz (2017), the protection of intellectual property has managed to become a real problem, or a problematic solution, to solve the dilemma of promoting and financing research.

Through this protectionist system of the author and the industries, research has not been directed at innovation or the creation of new products, but rather, it has only been intended to expand monopoly power until achieving a total monopolization of the market, easily granted through a patent. (Baker, 2017)

A clear example of this is the judgment of the United States Supreme Court in the Association for Molecular Pathology v. Myriad Gentis, Inc case (2013), in which it is made

clear that natural genes are not susceptible to being patented. Through this, it can be analyzed whether or not patents stimulate research and innovation. The results are unequivocal because innovation accelerated, research multiplied, and better diagnostic tests were implemented to determine, for example, the presence of certain types of genes related to breast cancer. All this, at much lower costs and thanks to the non-application of the industrial property protection system.

Finally, in the same line of thought, this theory considers that the current intellectual property regime is unsustainable because the 20th century's economy is different from that of the 21st century in several respects. Besides, it ensures that an open system of knowledge should be the rector of creations and inventions, but the world has chosen a different system. According to Jayadev's (2017) thinking, the prevailing intellectual property regime has created a diversity of barriers to access and application of knowledge, creating a large gap between private and social profits.

However, all this established scheme breaks down due to the development of the second position that has a different approach, despite also accepting the need to invest in the so-called weightless economy, which involves science, research, innovation, and technology. However, it addresses this need differently since it gives greater emphasis to the author and his right to receive compensation for the creation made. This theory understands that the protection of the general welfare and the collective access to knowledge does not make sense if there are no productions protected through patents or copyrights (Gallastegui, 2008). That is, if no content can be accessed.

The stagnation, both of production and of access to knowledge, which may occur as a consequence of the lack of application of practices that benefit the author and protect his intellectual and industrial property rights, is extremely dangerous and counterproductive because the disincentive it generates can reach be so shocking that research and creation projects cease.

The patent system needs to be approached from a vision that cares about the massive generation of knowledge. Authors, scientists, and discoverers are always interested in sharing their productions when they know that they will be rewarded for it and that, through this, they can become an economically sustainable way of life (Lipszyc, 2016). Otherwise, the creation of works or the discovery of cures for diseases or inventions of any kind would never be accepted as a valid source of income if access to knowledge is prioritized over its elaboration.

People are not motivated to produce if they know in advance that they will not receive any compensation. Currently, Ecuador does not have the highest levels of knowledge production in the world, despite the "Código de Ingenios" having made (insufficient) efforts to motivate innovation, the generation of ideas, and the creation of works. It is necessary to promote a culture of respect for the author and his intellectual and industrial property rights with greater force, through economic returns that gratify and reward researchers' work.

In the 21st century, the substantial changes that globalization has brought about make it necessary to rethink the existing forms of access to knowledge platforms that, in one way or another, break the strict framework established to protect the creator specifically. Moreover, they leave it in a vulnerable situation.

The containers of intellectual property rights are varied, and sometimes they get out of the control of the authors. As possible consequences of this fact, the decision not to produce more works, more books, more medicines, or even more ingenious inventions, because it is not profitable to support life. The impossibility of solving basic needs due to the absence of mechanisms that assure researchers and creators that they obtain the necessary financial compensation produces catastrophic effects at the level of cognitive production.

In this sense, the intellectual and industrial property ceases to become a source of income due to the few incentives it proposes, and which should be derived directly from innovation

and knowledge generation. The problem is present, as has been shown, at the legislative and application level of the patent and copyright regime, which does not sufficiently motivate the content creator to do it as if it were directly their profession, because they do not grant the necessary property assurances on inventions or creations.

2. PROTECTION OF INTELLECTUAL PROPERTY IN ECUADOR

The excessive amount of technologies and transformations of all kinds: economic, social, cultural, and political; they are fundamental characteristics of the structure and development of the 21st century. At this time, the most determining factor of human knowledge, development, and well-being is the evolution of cognition through this fourth industrial revolution that has been developing: the technological revolution.

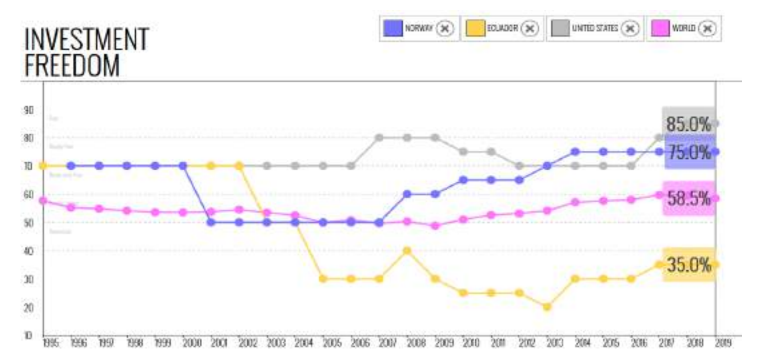
Access to all the knowledge contained in the internet network facilitates its application and places authors, creators, and scientists dedicated entirely to the research and production of new forms of knowledge at a disadvantage. Although this is a public domain asset, authors should be the main subject of protection and not vice versa. (Bercovitz, 2015)

In Ecuador, property rights are protected in just 35.9%, which means that more than half of these types of rights are left unprotected. On the other hand, developed, comprehensive, and protectionist legislation on the right to private property, such as that of Norway and the United States, a level of protection of 86.1% and 79.3% is reached (Index of Economic Freedom, 2019). These data are essential to consider since they directly affect areas such as freedom of business and investment.

Thus, in countries that manage a robust system of protection of intellectual and industrial property rights, the levels of investment, creation, and development are higher, since there is a guarantee for the creator of possession, use, and usufruct of themselves. In this type of system, is enhanced

the participation of a person or company in the process of creating or expressing knowledge. Finally, if the author is not protected, there will be no interest in generating or investing in knowledge, and consequently, nothing can be accessed, and nothing can be applied.

Following this argumentative line, Graph 1 describes the data related to freedom of investment.



Source: Index of Economic Freedom (2019).

Graphically, Norway, and the United States are countries with high investment percentages, 75%, and 85%, respectively. Besides, there is not a coincidence that they are also the same countries that grant more excellent protection to property rights. This scenario reflects that citizens in those countries feel the freedom and confidence to make investments of any kind because their property rights are duly protected by legal bodies, where private property is prioritized over the collective property.

Thus, they decided to invest in research projects destined for specific purposes: medicines for specific diseases, beneficial and innovative inventions, creations, books, and others. In this way, people feel supported at the normative level to undertake activities that allow them to generate a more significant amount of knowledge, and they also feel motivated when receiving financial compensation for the achievements they have achieved in their research area. How obtaining basic enough income to live is a reality for them; they keep creating content.

Meanwhile, in Ecuador, investment freedom is shallow, just 35%. While it is true, this is due to multiple factors, but the protection of property rights is undoubtedly one of them. Because the private property is not sufficiently protected in this country, people are not willing to make investments of any kind, even less in the research field, because they know that their rights will not be duly respected or remunerated.

In the specific case of intellectual property, the level of protection that Ecuadorian law has granted to rights continues to be insufficient. By prioritizing access to information, over the generation of knowledge, it is discouraging to large companies that want to Invest in research topics. Authors interested in generating the content of a different nature.

Likewise, data similar to those already mentioned are reflected in the field of freedom of company or business. In Ecuador, this parameter only covers 54.1%, while in Norway, it covers 89.4%, and in the United States, 83.8% (Index of Economic Freedom, 2019). These percentages are highly relevant if the aim is to accurately understand the scope of protection of property rights in general and intellectual property. With weak legislation that fails to promote research or the development of knowledge in any form, people are not free to conduct business that they would consider relevant to the advancement and evolution of artifacts, inventions, scientific discoveries, and others.

In this way, the freedom of investment and business reflect the reality of the protection of intellectual and industrial property rights that a country has. These factors are directly proportional, and in the Ecuadorian case, the creator's leading role as the raw material of any good or service that is the object of intellectual property law should be emphasized even more.

CONCLUSIONS

Throughout all the work, the need to pay more considerable attention to legislative policy becomes evident, mainly because there are currently various forms of production and access to knowledge that, on occasions, can be violated the intellectual or industrial property rights of its most direct owners: the creators.

A system that advocates free access to knowledge and all its forms of expression will eventually reach a point of stagnation and recession. On the other hand, a system that motivates, encourages, and rewards the author, will achieve greater varied and constant cognitive production. Consequently, the first system, sooner or later, will have no new content to access, while the second system will always possess innovative knowledge, goods, and services because the creators will be predisposed to elaborate them due to the benefits they represent.

It has been made clear that the intellectual property protection system has a direct impact on a country's economic environment, and that knowledge generation is a direct source of income. However, the problem lies in the lack of incentives to the author and the excessive protection of collective access to the various forms of expression of knowledge. All this produces adverse effects on scientific and cultural knowledge due to the setback or stagnation.

As demonstrated through various documentary sources, the genuinely optimal thing is not to deprive the creator of the rights that correspond to him as such, by guaranteeing free access to his form of cognitive expression. Instead, it is advisable to protect it so that it continues to research and produce based on parameters of innovation, utility, and creativity. It allows subsequent access to high-quality goods and services that contribute to achieving collective well-being, without forgetting that the real object of protection of the intellectual and industrial property right is the form of expression of knowledge, and not this in itself.

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Cynthia Mishel Gudiño Flores: Independent legal researcher

Email: cynthigf98@gmail.com

City: Ibarra

Country: Ecuador

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New challenges of Competition Law against the rise of Electronic Commerce

Nuevos retos del Derecho de Competencia frente el auge del Comercio Electrónico

Inés María Gálvez Delgado
Independent legal researcher
René Antonio Gálvez Delgado
Independent legal researcher
City: Quito
Country: Ecuador

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ABSTRACT: Electronic commerce has established itself in recent years as one of the best marketing strategies globally for its efficiency and ability to bring producers and consumers closer together. However, the increase in the use of digital channels has generated a recent discussion in the legal community regarding the implications that this fact has on Competition Law. This note then aims to analyse the challenges facing free competition law in the scenario of new technologies and digital commerce. Moreover, this research note states that there are great difficulties for Competition Law since the consolidation of Big Tech also since these dilemmas are related to Ecuador as a consequence of its current regulations and the little technical expertise.

KEYWORDS: Globalisation, electronic commerce, efficiency, market, legislation.

RESUMEN: El comercio electrónico se ha consolidado en los últimos años como un mecanismo que promete revolucionar el mercado en el mundo por su eficiencia y capacidad de acercar a productores y consumidores. Sin embargo, el aumento

en el uso de canales digitales ha generado discusión en la comunidad jurídica respecto a las implicancias que este hecho puede tener sobre el Derecho de Competencia. En este orden de ideas, esta nota de investigación introductoria tiene como objetivo realizar un análisis acerca de los diferentes desafíos que enfrenta el Derecho de Competencia en el escenario de las nuevas tecnologías y el comercio electrónico a través del análisis del contexto ecuatoriano a comparación de otras realidades. A lo largo de las siguientes páginas se exponen una serie de argumentos que ilustran los nuevos retos que trae la consolidación de gigantes tecnológicos como las Big Tech en el mercado y además se argumenta como estos dilemas se amplifican en el contexto ecuatoriano como consecuencia de la calidad de su regulación y la poca experticia del país en la materia.

PALABRAS CLAVE: Globalización, comercio electrónico, eficiencia, mercado, legislación.

INTRODUCTION

Nowadays, electronic commerce has become an innovative mechanism that offers agility and versatility when it comes to bringing producers and consumers together through new forms of interaction such as digital channels on web pages, which are very useful for offering goods and services. However, these changes in the market seem to generate a crisis in line with those mainstream economic concepts that deserve to be reviewed or contextualised in the current global and technological scenario

This research note reflects and develops in a preliminary and introductory way on a current issue such as competition law in the face of the transfer of commercial interactions to digital platforms. Then, an approach will be introduced about how the law has reacted to this phenomenon and the challenges for emerging countries such as Ecuador.

In this work, several questions are presented that revolves around several questions among which are: How have other States managed the new digital commerce processes ?; How can digital media abuse by companies with excellent market power be avoided ?; What does the traditional doctrine of Competition Law have to say about this reality?

To answer these questions, in this essay, a bibliographic review methodology will be used, through which a series of criteria are exposed that allow us to elucidate the previous approaches in a broadway.

In this order of ideas, in the first place, issues related to Competition Law and the incursion of digital commerce will be addressed, in this section, we try to demonstrate how electronic commerce represents a sudden situation for some of the traditional bases of Competition Law. Throughout the second point, the dilemma of the power of "Big tech" will be mentioned as an iconic fact that has marked relevant precedents in developed countries such as the United States. For them, some cases are described in this area and, finally, We proceed to make mention of the Ecuadorian reality in front of new technologies and how this has influenced the country's commercial sector, also highlights the main obstacles that Ecuador must face inserting its economy in this new reality.

1. ELECTRONIC COMMERCE AS A NEW PROTAGONIST OF COMMERCIAL RELATIONS.

Today, traditional marketing methods have been affected by the incursion of digital commerce that is characterised by offering more magnificent facilities to consumers and having tools that boost sales by making it more agile and personalised thanks to online searches. Electronic commerce has grown exponentially in recent decades and has brought to the table the discussion of the role of Free Competition in this new and changing field.

Technological changes have brought several implications in the economic policy of the States and carry a series of remains on various issues. Therefore, it is essential to ask, How will the Law face these challenges? How to regulate the handling of consumer information? How to control the dominant position of specific companies? These are topics that are very unnoticed by the legislator and cannot be treated lightly despite the multiple advantages that electronic commerce brings. (Witker, 2018, p. 9)

Even though digital commerce has several positive aspects, it is evident that it requires the necessary implementation of regulations that avoid anti-competitive practices. However, its implementation is hard work, which will take time and extensive studies, especially in developing countries—development where the theory of Competition Law itself does not register significant levels of development.

Society in the 21st century has a logic of consumption that seeks much faster and simpler means, as Eugenio Urdaneta points out “high-technology systems are increasingly necessary, due to the” time “factor, people live in a highly competitive society where everything is managed according to time. ” (Urdaneta, 2005, p. 213). It is for this reason that in the traditional physical market every day, it loses more ground before the electronic media, and this can be increased in scenarios such as the COVID-19 pandemic.

It is increasingly common to observe in Ecuadorian society the effort of various sectors to engage in online commerce, not only because it is an advantageous mechanism for doing business, but because it is a necessary strategy to stay in a market where individuals choose to Simple strategies to acquire goods and services. Thus, producers have been forced to adapt to this new reality, that is, to adjust and take advantage of the modern trade model. Regarding this adaptation, it is essential to add what Fernando Moliní points out. Who states that the lack of adaptability to the new technologies of the modern company is a very relevant negative factor. (Moliní, 2002, p. 137)

As the author expresses in the previous statement, whoever does not adapt to the reality of online commerce has a significant barrier to the exercise of economic activity and runs the risk of being expelled from the market, even today it can be seen that Customer acquisition strategies have focused on the use of digital platforms exhaustively.

The digitisation of the marking brings other benefits for companies such as the possibility of establishing more robust relationships to generate more effective exchanges of information between them, at low prices. Also, a prominent example is the algorithms that platforms such as Facebook or YouTube have that offer goods and services in a personalised way based on the behaviour of users. Furthermore, such information is used by several companies that have established strong ties with each other.

These advantages have generated high expectations for entrepreneurship and innovation, which is why emerging companies see the fertile ground in the current context from which to take off, a terrain that is more efficient than the physical market. As Maximiliano Palos indicates:

> One of the essential advantages in electronic commerce is that it allows us to increase the efficiency of the company since it makes the steps for purchases shorter and faster and, on the other hand, the image of the company becomes more attractive to buyers, since they have a better perspective when seeing sales or promotions in images than in letters and it is cheaper for companies to create an online promotion than to create a physical poster. (Palos, 2014, p. 10)

Entering electronic commerce translates into great possibilities within the market, implies the latest strategies of economic globalisation, and that is why companies have spared no effort to enhance this dimension and even demonstrate various benefits that commerce can have. Electronic.

In this way, the purchasing procedures have been simplified and have less and fewer difficulties and more significant advantages for consumers. Also, it has undoubtedly increased the predisposition to purchase and consumer confidence in the good they have purchased. Moreover, it is essentially highlighting the strategies of companies to achieve a friendly and safe environment for the consumer in their online channels. Then, that security in electronic commerce is no longer a reason for concern because lately, it has improved substantially, mainly since Large technology corporations (seeking to keep a high ranking worldwide in their sales). Besides, improving communication between producers and users have generated a climate of trust in this area.

The demands for higher standards of quality and simplicity have resulted in an improvement in purchasing procedures that now have higher guarantees against any inconvenience that may arise concerning the acquisition of a good or service and gives the possibility to consumer the possibility of knowing in advance the form of distribution, organisation and if necessary, the conditions for the due process of return. (Linero and Botero, 2020, p. 213)

It is evident that users invest much time in digital platforms and this has been appreciated as an essential factor for corporate growth since the internet offers excellent facilities to reach potential consumers with the offer, and this is a great reason to suspect that in a few years the vast majority of commercial activity will be strictly linked to the internet.

For these reasons, electronic commerce currently grows steadily, mainly in developed countries where companies have been able to respond to consumer needs.

> At this time, the active participation of the main actors in the process of technological innovation linked to communications and information technology is observed in the world, in the sense of generating a state of consciousness about the importance of the development of electronic commerce and, in particular,

> to elaborate a framework of multilateral rules of the game that are respectful and promoters of said development. (Esteves and Fernández, 2019, p. 27)

A world where electronic commerce is the undeniable protagonist of the market is inevitable. It is not known whether this reality will come in the short or long term. However, in developing countries such as Ecuador and other Latin American states, a review of the most primitive institutions that govern our legislation and local Competition Law is crucial. To the opposite side, we have those developed countries where there are efficient regulations on the matter. Then, developing countries await a complicated scenario where rules of the game are not established and efficient to take advantage of the digital commerce correctly and fairly.

2. THE DILEMMA OF THE POWER OF THE BIGH TECH AND ITS IMPLICATIONS IN THE RIGHT OF COMPETITION

Competition Law is understood as the field of law that aims to control prohibited conduct or unfair acts that affect the market. It has its characteristic in the interaction between elements of public law and private law. Also, it establishes specific limits for natural and legal persons, and it establishes specific parameters regarding what they can or cannot do in their participation in the market so that their actions do not affect competition. For example, it limits the conclusion of specific contracts that directly or indirectly affect competition, as well as the prohibition of certain abusive practices. (Palacios, 2013, p. 87)

Competition is considered very important for the health of the market since it creates efficient conditions for those who participate in it and allows the final recipient of the goods to receive quality products and services, without interference from abusive behaviours that affect the producer and the consumer. It is one of the main postulates of Competition Law which must be observed by economic agents to know the proper way to carry out their economic activities, to this can be added a precession manifested by Parot and Reveco:

> It is not an unfair competition to capture a client from a competitor, a matter of the essence of a market, but it will be when using means that violate the decency and correction of the conduct of the competitors. (Reveco and Padilla, 2017, p. 377)

In this way, Competition Law is constituted as a critical element in the market in order to guarantee the freedom to compete and offer of economic agents. However, its the main objective to specify an effective economic system where equal conditions are reflected to ensure both free choice and fair economic development (where everyone has the same opportunities in the market).

The traditional postulates of Competition Law have not met much opposition and for years have been embraced by legislation and economic policies. Nevertheless, in recent years Competition Law seems to face a significant challenge derived from technological advances and digitisation of the market and this challenge seems to be more acute in developing countries due to questions inherent to the quality of its regulation and the time it takes to adapt to technological changes.

The technological advances of the last decades have brought about the emergence of large companies known as “Big tech”, and their appearance has relativised the foundations of traditional Competition Law that have encountered difficulties due to innovations such as electronic commerce and the potential of technology to Identifying consumer interests. Big Tech has now gained significant weight in the market thanks to various business strategies, such as establishing relationships based on the exchange of information between large corporations.

Although this has a positive effect by allowing exponential economic growth, it also raises concerns about the situation of small corporations, who are overwhelmed by the upturn in Big Tech, which has become a kind of monopoly thanks to its high power. The reason why their sales and growth are threatened and in fact, today, the technological and commercial sphere is dominated by companies with high power of influence such as

Amazon, Google, Facebook and Apple. Therefore, the debate has increased about the role of Competition Law before these giants and the necessary conditions to allow fair competition between the various actors participating in a market that now has a strong digital component.

Competition law dictates that the market must be made up of a multiplicity of competitors who are in an equal position with each other and can benefit under fair conditions of economic activity. From classical liberal theory, competition is conceived as a factor that favours the market economy since it provides the necessary conditions for market actors to obtain benefits, in this way consumers can choose the products and services that are most convenient to their wishes and needs and producers can make their offers freely.

The current discussion is about how the economic activities of Big tech, due to their enormous market power, generate an effect on competition, which obviously can result in an effect on allocative efficiency and freedom of choice. (Araya, 2012, p. 242)

In recent years and without most people realising it, market dominance has moved to the internet, specifically to digital platforms belonging to technology giants that can offer different goods or services based on consumer preferences obtained through an aggressive information gathering policy. While this is not in itself detrimental to the market or competition, it is crucial to question the implications that a small number of companies have so much power in such a short time; This can indeed harm the market and other fundamental rights of individuals.

Today's society is attracted to Big tech thanks to the ease that it gives them to acquire any good through their platforms. However, this form of commercialisation is not subject to the same control as physical, economic activities and this is due to the inaction of governments on the matter who still have significant gaps regarding how to promote a competitive market in the digital sphere.

The business models supported by the new technologies arrived very abruptly, making it difficult in the short term all the implications of the Big tech field. It is characterised mainly by market speed and e-commerce business strategies that constitute a continuous improvement process which has managed to increase sales at an exorbitant rate thanks to its multiple intelligent management tools. (Esteves and Fernández, 2019)

In this way, several corporations that make up Big tech have positioned themselves as the centre of various monopoly accusations, especially in recent times under the argument that their digital power can become a tool to manipulate the market according to their interests. Furthermore, there seems to be a solid basis for claiming that anti-competitive trade practices do indeed occur, even if Big Tech does not recognise it in this way. For this, in the following lines, some aspects in which Competition Law has been affected in this area and some specific cases that portray the challenges to generate a competitive digital market are mentioned.

First of all, it is worth mentioning the enormous capacity for interaction that Big tech has with consumers, which has been shown to influence choice effectively, here the problem lies in the risk that Big Tech can promote and sell goods and services at its convenience overshadowing other bidders. It is the case of Amazon, which has been repeatedly accused of modifying search algorithms to give visibility to a limited number of brands and products for the benefit of its interests.

Another factor that has affected Competition Law in this area is the uneven development of electronic commerce in each country, which can translate into scenarios such as Amazon's having a higher probability of occurring in countries with systems that are not open to digitisation. of the market, nations that, eventually, will be forced to revise their legislation in the matter to make way for these changes that, although they represent a significant contribution to the development and that ferment economic growth, carry a series of inconveniences related to the Right to Competition.

The situation of Big Tech, for the time being, has had an impact in developed countries, such as the United States. In this country, several corporations have received sanctions and fines for anti-competitive behaviour, such as modifying search results for their benefit to grant advantages to certain products. , which may eventually lead to market failure. (Soto-Pineda and Pabón-Almanza, 2019, p. 281)

Another recent case with a Big Tech company was the controversy unleashed behind the Cambridge Analytica case in which a private company was accused of marketing with confidential information of Facebook users in order to influence, by manipulating their preferences. Results of the 2016 presidential elections in the US and as a result, it was necessary for Marck Zuckerberg to appear before the Senate to render his version of what happened in an uncomfortable session for the Facebook CEO who was criticised for creating a "monster technological "that has lost all control; Similar cases were presented in the UK under the context of the BREXIT in which the influence of Facebook on the results of the 2016 referendum is suspected.

> The origins of the referendum might be traced back to the last decade, insofar as scepticism concerning the EU was increased in UK politics, about that some people even think that exist influence in social media to motivate this feeling. (Craig, 2016, p. 35)

The US government has thus seen the need to seek urgent regulations that allow greater equality in the digital market to generate the possibility that small corporations may reach more consumers and that their attention is not biased towards Big tech, which, thanks to its enormous capacity to collect user data, has a significant advantage over other providers from a more diverse group. It is essential to highlight that the solution lies in a comprehensive improvement of the regulation and not exclusively in the sanction even though, in the words of Katsoulacos, Motchenkova and Ulph (2019), this is considered the most comfortable and fastest solution in the matter. Developing countries like Ecuador should take this and

other essential lessons from developed countries into account in order to know how to react correctly when Big Tech makes a deeper foray into their economies.

3. ECUADORIAN COMPETITION LAW, NEW TECHNOLOGIES AND ELECTRONIC COMMERCE

In this section, we will proceed to address specific issues related to Ecuadorian legal development in matters of electronic commerce, and from this point, it can be stated that it still has a long way to go to deal with issues related to Competition Law. However, they are remarkable some progress that has materialised in recent years.

To illustrate how Competition Law is carried out in Ecuador, it is important to mention first aspects related to the Constitution of the Republic, which is the supreme norm addresses general economic and legal issues. Hence, it is necessary to mention the term "economic constitution" refers to the economic issues established at the constitutional level where notions such as property and work are addressed, as well as the participation of the State in the economy and the processes of trade regulation.

The 2008 Constitution has a relationship with the economy that is highly criticised mainly in liberal spheres, and this is a consequence of its strong ideological content oriented to the social aspects of property and with the mission of stimulating the development of different economic activities through of the application of a legal order based on Andean constitutionalism and the creation of new equitable rules of the game that manage to promote, encourage and protect economic activities, especially small businesses and the social economy.

The Constitution of the Republic of Ecuador has as one of its purposes, at least formally, to provide the necessary mechanisms to guarantee the excellent state of the market. However, it can be stated that it has a very poorly developed perspective on issues of Free Competition, something Worrying as it is an essential aspect at a legal and economic

level, however, if it has certain notions that may be useful in the field of Competition Law, but they are not always sufficient. Therefore, certain advances in the matter are mentioned below, as well as some difficulties that must be overcome in the digital commerce scenario.

In the first place, it can be mentioned that the constitution guarantees rights such as property rights and company freedoms, besides, it provides guidelines that govern lower standards, the constitutional framework concerning the economic system dictates that the State act in favour of compliance with specific objectives set in favour of the optimal balance of the market. The Ecuadorian constitution also aims to create an optimal commercial environment where all producers have ethical conduct in the different activities they carry out to create an optimal commercial environment.

Another essential aspect that can be highlighted in the field of Consumer Law is that the constitution considers these as one of the priority attention groups. However, the latter is debatable. It can be affirmed that it has generated a solid basis for the state worry about the commercialisation of products that present the necessary conditions to be offered, that is, being accessible to consumers. They have sufficient confidence to purchase said product.

Based on the above, several national plans have been carried out in Ecuador that seek to strengthen the existing market networks in the country, however, for this, a more schematic and objective strategy in defence of competition will be necessary to boost the economy to levels favourable. (Monteiro, 2017, p. 3). It is also essential to consider the control of monopolies and oligopolies present in the national economy, the existence of which directly affects the proper functioning of the market in general, which is why it is so essential that one of the tasks of the State, in its pursuit of development, is to control of the different anti-competitive behaviours that may eventually translate into market failures.

Although the above recommendations are known, and measures have been taken in this regard, it is essential to question whether the State is performing these tasks efficiently, at the lowest possible cost and, above all, if it is considering the field of electronic commerce in these activities.

The Ecuadorian State has made some progress at the legislative level and has recognised the new forms of electronic commerce in the Commercial Code issued in May 2019 that includes issues related to the digital market such as the recognition of online consent, however, there are still issues pending to guarantee market access opportunities for the population, and to achieve such access and the integration of Ecuador into a more extensive and beneficial commercial field at the national and international level Marcelo Sevilla (2010) mentions that:

> It is vital to guarantee suitable legal mechanisms to reach a social and solidarity economy within the framework of competition: additionally, the objectives of the competition rules are precisely the search for the well-being of society through the rules dictated by the State (competition legislation), with which the most significant and best products on the market is achieved so that consumers acquire goods or services at the lowest prices and the best quality, according to their choice. (p. 50)

One of the main difficulties to mention is that Ecuador during its history has had severe problems concerning competition within the market, starting with the fact that there are substantial barriers to entry, such as the business creation process, which is not very advantageous for economic agents Ecuador has established a large number of restrictions that have adverse effects on the market and do not allow development, and this is further exacerbated by the complicated economic and social situation that the country has been through forever. All of this hinders foreign investment, and therefore it is not very common to see foreign companies investing in the country in the long term.

Although the new commercial code has introduced notions of electronic commerce, it is worrying that more attention has not been paid to the Organic Law on the Regulation and Control of Market Loss, considering that this regulatory body is in charge of regulating Competition Law. At the national level, this can be very damaging in the future when large technology companies make a more significant foray into Latin American economies.

At the international level, for its part, it is essential to highlight that Ecuador is, together with Peru, Bolivia and Colombia, a member of the Andean Community, so its policies should comply with the guidelines outlined in Decisions 608 and 616, which address issues related to promoting free competition. CAN Decision 608 in its article 7 sets out a series of conducts that the organisation considers to be anti-competitive, and its article 8 addresses issues related to the abuse of the dominant position.

For its part, Decision 616 empowers the country to adopt legal standards to ensure free competition by decreeing the entry into force of Decision 608; However, it is essential to mention that both instruments do not address issues related to electronic commerce and this is a significant deficiency today when considering the circumstances of the market and its progressive digitisation.

Another challenge facing the development of electronic commerce in Ecuador is the access of the population to technology since for full access to the digital market this is a necessary condition. In developed countries, the telecommunication bases and the necessary means are generally available to the vast majority of the population (although it is right not universally), at an affordable cost.

In developing countries such as Ecuador, the computer media that are essential to digital commerce have long been limited and restricted to a relatively low percentage of the population that could pay for them, in the same way, a significant number of Both small and medium-sized companies

did not have access to advanced technologies that would allow them to progress in this new business model. It is a compelling reason why legislative and social development in this regard is very slow in the country.

Even though Ecuador is among the first countries with the highest use of the Internet in Latin America for some years, specific difficulties still exist, such as the lack of long-term planning and the lack of legal certainty; With these problems on the table, it does not matter if the use of technology is a crucial component of citizens' lives, the drawbacks to developing a robust Competition Law in the virtual field will continue, which is why it is essential to implement regulatory improvement programs and look for new opportunities to change this reality, not very promising in the commercial environment.

Ecuador is currently considered one of the South American countries that have the most significant number of users that interact on the web, and this has been appreciated by Big Tech as an opportunity to enter the national market. Large companies such as Amazon or Facebook with this strategy have reached surprising levels of growth in Latin American countries. Therefore, digital commerce in Ecuador is increasing every year generating development, however, the risk that these large monopolies effect to the national economy without the possibility that the legislation or the authorities do something about it as a consequence of the low development in this matter.

The arrival of social networks was the first step of the incursion of Big Tech in the country. Currently, they are widely accepted in the Ecuadorian market, consumers have taken advantage of them to make many online purchases, it is essential to add that electronic commerce links The Ecuadorian economy is even stronger with the international economy since the majority of companies that can handle this type of commercialisation are mainly established in developed countries such as the United States, South Korea, China, and others.

Ecuador, through the development of electronic commerce, plans to have more significant interaction between consumers and private companies, increasing production and digital transactions. Many authorities in the country have stated that the growth of electronic commerce depends not only on the production within it but also on the confidence that the public has to make online purchases, this last point is one of the main problems in Ecuador given that The level of insecurity in the data exchange processes over the Internet is known, another aspect that has been little developed in the country.

It should be mentioned that managing money on the web is very risky without the necessary security measures because personal information is exposed to a multiplicity of servers that may eventually be victims of a hack. The country must apply more exceptional digital security strategies and marketing regulations in order not to be left behind and take advantage of the economic benefits that this new trade model can bring, as Gladys Rodríguez (2005) mentions:

> This need for world trade interrelation has led to a notable increase in the economies of the different countries; which is why they have had to adapt their legal framework in such a way that this guarantees security, confidentiality, consumer protection and authenticity in commercial transactions. (p. 4)

The use of electronic commerce by consumers brings countless advantages, however, in order to take advantage of these benefits, it is necessary to make the necessary changes as evidenced by the reality of developed countries where the legislation has had to carry out various optimisations, as a consequence of the enormous impact of the economy due to the rise of digital commerce.

The application of legislation that can provide the corresponding levels of security and efficiency is a constant effort to obtain assurance that the different businesses conducted over the Internet will not have significant problems related to the danger of exposure of personal information and

abuses towards competitors. Also, a positive expectation must be generated for the commercial, manufacturing, institutional, corporate sectors, and others. The adaptation of Ecuador to this model of electronic commerce is not a static task, on the contrary, it is a dynamic task aimed at improving the country's economy both internally and in the face of the rest of the world.

The role of public policies concerning electronic commerce and new technologies is crucial. It should not be underestimated, especially the need to adequately control and optimise different aspects that surround companies when entering this commercial strategy, for example, the correct determination of the quality of the goods and services offered to users, control of anti-competitive behaviours and vigilance for the control of unnecessary bureaucratic barriers.

In the same way, the importance of having clear and understandable legislation in the field of electronic commerce, which is harmonious with the standards of other States, should not be neglected, since the characteristics of this market make it necessary to coordination between the various actors that make its existence possible and for such coordination, the legislation must be simplified and efficient, in this regard Mariano Carbajales (2019) states:

> In its purest form, regulation refers to the promulgation of a set of binding norms accompanied by specific mechanisms, usually a public agency, to monitor and ensure compliance. The drafting of rules (rule-making) and the control mechanisms for their enforcement (enforcement) need to be located in a single institution. (p. 47)

Following the above, it is essential to add that Ecuador has a great challenge ahead and it is to gather the necessary conditions to adapt its legislation to these new changes, especially within the field of Competition Law where it is still a very new State. It is necessary to keep economic activities in constant evolution, under fair and competitive conditions. In short, regulation guarantees the stability and balance of

the system as long as it is carried out under the perspective of economic efficiency and above all guarantees freedom in the flow of goods and services.

CONCLUSIONS

Throughout this essay, issues related to Competition Law and the challenges it faces from new technological developments were addressed, which makes it increasingly necessary for a regulation consistent with the benefit of all economic agents in the market. However, competition can indeed be enhanced thanks to the innovations implemented in the world. Sometimes this can be a counterproductive factor.

In the first place, it was about how Competition Law enters an uncertain field and how the traditional business model adapts to contemporary advances where technology is a fundamental pillar of daily life, it is Thus, electronic commerce appears as an alternative to bring producers and consumers closer, but at the same time, it constitutes a new challenge for the traditional postulates of Competition Law.

Second, the “Big Tech” dilemma was addressed as an example of how new technologies can lead to potential abuses of market power and commercial domination, detrimental to proper growth and development. Among the companies known as “Big Tech” are Google, Facebook, Amazon and Apple; Among its main activities is the sale of different products of public interest and they are characterised by the reliability they inspire consumers, however, it is concluded that there is an evident need to control them for certain anti-competitive practices that they may develop.

Different techniques have been adopted in order to establish control over these platforms. However, they have proven to be inefficient in avoiding the constitution of what can be defined as a kind of monopoly in the consumer access network, the challenge now It is looking for efficient mechanisms capable of generating a positive economic impact, especially in the commercial environment.

It is also concluded that another difficulty is the disparity of technological progress between developed and developing countries where the context is very different, and its law finds more significant disadvantages when it comes to regulating electronic commerce, adding that any country that intends to enter into Correctly, in this new trade model, it must take into account its factors such as the level of access to the network by the population and the development of its Competition Law.

Finally, it is necessary to highlight that legislation has a critical role given the importance of avoiding anti-competitive behaviour, however, it must be efficient and include current notions to take full advantage of these new realities. It must be recognised that electronic commerce constitutes an excellent opportunity to boost a country's economy. However, Competition Law cannot be left behind in the face of this unknown and profoundly changing scenario in which its field of action is considerably reduced.

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Inés María Gálvez Delgado: Independent legal researcher
Email: inesmaria119@hotmail.com
René Antonio Gálvez Delgado: Independent legal researcher
Email: renegalvez627@gmail.com
Country: Ecuador
City: Quito

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Organized armed groups in the International Humanitarian Law

Los grupos armados organizados en el Derecho Internacional Humanitario

Valeria Monserrath Sánchez Morales
Independent legal researcher
City: Quito
Country: Ecuador

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ABSTRACT: States comply with international treaties because they have negotiated, signed and ratified them; however, organised armed groups are not part of these processes and still have an obligation to comply with basic rules of war. This document argues that the Internacional Humanitarian Law must be respected by all those involved in a conflict; besides, it provides arguments for organised armed groups to commit to a norm that they have not directly accepted. International Humanitarian Law as an erga omnes norm shows a specific nature and application, which is why it applies to all citizens, it is a customary norm for which it obliges respect for the norm by all individuals. Finally, an armed group regroups citizens of a country, so they must respect the norms established for the State.

KEYWORDS: Humanitarian Law, Military forces, Armed conflicts, Treaties.

RESUMEN: Debe entenderse que los Estados cumplen con los tratados internacionales porque ellos los han negociado, firmado y ratificado; sin embargo, los grupos armados organizados no son parte de estos procesos y aun así tienen la obligación de cumplir con normas básicas de la guerra. Este documento argumenta los motivos por lo que el Derecho Internacional

Humanitario debe ser respetado por todos los intervinientes en un conflicto; además, brinda argumentos para que los grupos armados organizados se obliguen a una norma que no han aceptado directamente. Se especifica que el Derecho Internacional Humanitario es una norma erga omnes, por lo que rige a todos los ciudadanos; es una norma consuetudinaria por lo que obliga el respeto a la norma por parte de todos los individuos y finalmente, un grupo armado está conformado por ciudadanos de un país, por lo que deben respetar las normas fijadas para el Estado.

PALABRAS CLAVE: Derecho Humanitario, Fuerzas armadas, Conflicto armado, Instrumento internacional.

INTRODUCTION

War has been seen by several states as an alternative to conflict resolution, as it “kills the enemy” and determines the power of one state over another. This is why it is vitally important to determine that States, organised armed groups, national liberation movements and individuals within a levée en masse have certain rights and obligations to respect according to the role they play in an armed conflict.

This publication seeks to determine the motives, specifically of organised armed groups, for respecting International Humanitarian Law (IHL), it is understood that these are not part of the stages for the creation of an international norm such as treaties, conventions or agreements.

After defining the armed groups as a recognised party to an armed conflict, an attempt will be made to determine the obligations under treaty law, customary law and doctrine, in order to finally identify the internal causes of the armed groups organised to accept and respect IHL.

This work has been written because, when analysing the subjects that can intervene in an armed conflict, it is visualised that the Armed Forces are obliged to respect IHL. After all, their States have ratified the Geneva, Hague and New York Conventions (which are the primary sources within this

branch). However, when talking about armed groups, there is no legal link that leads to an obligation to respect IHL rules, since as we have said, they cannot negotiate or ratify treaties, but even within this margin. Also, it has been visualised that over time, most of the Organised Armed Groups (OAG) have respected and complied with the mentioned rules within the armed conflicts that have developed.

Academically, the following research project will determine the reasons why an organised armed group respects and complies with international humanitarian law. José Manuel Sánchez (2016) states that “the question arises concerning non-State entities or armed groups that have no connection with government forces, but rather as such dissident forces participate in an armed conflict of a non-international character” (p. 77). For this reason, the need arises to determine the reasons these armed groups have for respecting the legal order.

Within the following lines, we will seek to determine if there is a rule that obliges Organised Armed Groups to respect International Humanitarian Law.

When considering state of the art on this subject, it can be seen that this approach has not yet been determined; however, a small approach refers to the fact that armed groups have been considered as subjects of Public International Law when a conflict exists since this is a means of linking them to international norms.

1. ORGANISED ARMED GROUPS: SUBJECTS OF PUBLIC INTERNATIONAL LAW

Wars have never been a distant reality to the development of society. All history has witnessed an armed conflict that has helped to create and determine standards.

Considering then that, “if states have relations, those relations must be directed by rules that require careful observance, and are called international laws”. (Alcorta, 2009, p. 10)

Thus, on 22 August 1864, with the signing of the Geneva Convention, IHL was born. For Salmon (2012):

> International Humanitarian Law applies to situations - armed conflicts - which should not exist if the law is respected. The apparent tension between fighting or regulating these situations would be solved by a Law that, approaching military logic, tries to rationalise and reorient them to the only justifiable objective in the framework of an armed conflict: to defeat the enemy. (p. 19)

In other words, IHL humanises and regulates war, to limit the power of armed forces and groups fighting in a war, avoiding causing more havoc than expected when talking about a situation like this.

1.1. International Humanitarian Law as a branch of Public International Law

IHL is a branch of Public International Law; born from the laws of States, "then International Law not only arranges relations of a public nature but also of a private nature since they are born under the laws or customs of different States and therefore can indirectly affect the links that it is in their interest to maintain" (Alcorta, 2009, p. 10). Therefore, it should be evident that it is the sovereign States by mandate of the people, who are linked to rules of international character in order to strengthen their relations.

According to Sassóli, Bouvier and Quintin (2011):

> Public international law can be composed of two branches: a traditional branch consisting of the law regulating coordination and cooperation created by states - and a new branch consisting of the constitutional and administrative law of the international community of 6.5 billion human beings. (p. 9)

Therefore, the aim is to create a norm that links the signatories and ratifiers of international norms (States) with their sovereign members and trainers (citizens), this link being

the basis of the Social Contract since without a doubt the respect of citizens for the norms imposed by the State arises from the tacit acceptance when granting a portion of our freedoms to live in society.

To be precise, with the Social Contract, citizens grant a portion of their liberties to a superior entity called the "State", so that it can regulate their coexistence, dictate rules and watch over their rights in daily relations, being, therefore, the necessary foundation for the laws written and ratified by the State to oblige those who are part of it.

The rules of war have been part of international custom over the years; however, after the Second World War, the normative frameworks were positive with the 1949 Geneva Conventions and their additional protocols, the Hague Conventions and the New York Conventions, being the normative basis applicable in these situations. The Geneva Conventions or the Law of Geneva are part of the "ius in bello", which is a set of rules that must be applied when a war has started; while the New York Conventions or the Law of New York is part of the "Ius ad bellum" that defines the legitimate reasons why a State can wage war so that it can be classified as a just war in all areas of development. (Valencia, 2013, p. 25)

The law of war, therefore, is based on the evident and historical reality, where States confront each other using force for different reasons and objectives, it being useless to determine both aspects since they are equal to the number of wars that have taken place in history and that will take place in the future. However, the objective of IHL, as will be seen below, is to protect civilians and those who have ceased to participate in hostilities.

"States must transform treaties into regulations following their contexts. It will generate a coherent legal system that makes treaties not just desirable measures in the abstract, but concrete norms with protocols for implementation" (Salvador Lara, 2018, p. 128). Therefore, it is clear that the obligation to respect and implement arises from the sovereign will of states to integrate international norms into their domestic order.

Another obligation of the States is to teach in times of peace their citizens and their armed forces the rules that IHL disseminates; "the general messages must generate an environment in which society as a whole understands that not everything is permitted in the framework of armed conflicts, and thus, a greater acceptance is expected, and respect for them is increased". (Olivera Astete, 2018, p. 141)

1.2. Subjects of International Humanitarian Law

Within this context, "not every conflict is armed and not every form of violent opposition can be considered armed conflict" (Valencia, 2013, p. 97). Thus, for an armed conflict to develop, minimum requirements must be met, and at least two parties must be involved, which can be State Armed Forces, Organised Armed Groups, National Liberation Movements and "Levée en masse".

The State Armed Forces emerge as a subject of international law as they are the ones who defend the sovereignty of the states by a mandate that is proper to national norms. Therefore, "as IHL is conceived as a legal body that regulates belligerent interstate relations, it obliges the armed forces to respect it without the need to give express acceptance, provided that the States have obliged themselves". (Sassóli, Bouvier and Quintin, 2011, p. 9)

National liberation movements (NML) develop when a colonising power finds itself controlling territory and the organisation of a state, outside the power, and therefore NMLs aim to become independent considering the principle of self-determination of peoples.

On the other hand, levée en masse refers to a specific moment when the citizens of a village take up arms to confront the attempted occupation of a foreign state force. Organised armed groups will be developed in the following pages as subjects of international law participating in non-international armed conflicts and their obligations to the international community.

When an armed conflict occurs between the armed forces of two states, it is called an international armed conflict (IAC), and the legal framework applicable to this specific case contains the four Geneva Conventions of 1949 with Additional Protocol I of 1977, the Law of the Hague and the Law of New York.

However, inter-state armed conflicts have decreased in recent years, and new ways of waging war have emerged. Within this framework, organised armed groups (OAGs) are formed to fight for ideals far removed from the formation of states, that is, they seek to fight states, in the first instance, to fight for fixed objectives.

In recent years, after all the struggles for decolonisation, "the war of national liberation has been elevated to the rank of an international armed conflict" (ICRC, 2008, p. 4); therefore, the National Liberation Movements are a recognised part in the development of an IAC, and this determination to link to the legal frameworks applicable to each situation is essential.

The law, in general terms, prohibits the use of force between states as a legitimate means of resolving disputes, which would lead us to understand that states cannot confront their citizens. "On the contrary, IHL allows that, on its territory, a state may use force against groups or individuals as long as it is to promote compliance with the law" (Melzer, 2016, p. 55). It is from this premise that, tacitly, organised armed groups monitored by IHL develop to confront other armed entities in an armed conflict.

1.3 Organised armed groups and non-international armed conflicts

The regulation for Organised Armed Groups is quite limited in International Humanitarian Law, since:

> States have long regarded internal conflicts as short-term separations that can be controlled by domestic law because no state is ready to accept that its citizens can wage war against its government. (Sassóli, Bouvier and Quintin, 2011, p. 228)

Therefore, in Non-International Armed Conflicts (NIIAC), the applicable legal framework is the law of the Hague, the law of New York and concerning the conduct of hostilities, article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II (APII). It is evident within the development of applicable law for the CANI that States have the primary and principal responsibility for the care of citizens, although it is attempted to link this duty of care to the GAO. (Kalshoven and Zebveld, 2005, p. 18)

It must be understood that States must apply IHL in a CANI because they have ratified the Geneva Conventions, which does not prevent the application of internal regulations in the country, however, as it is a more specific rule that seeks to protect citizens and guides the authorities of a State in their actions when directing force against combatants. On the other hand, a CANI can be "internationalised" when a state other than the territory of the conflict supports the organised armed group by creating a scenario where states confront.

The IIAA "refers to situations of "armed conflict", in which "hostilities" and "military operations" take place, but it does not refer to "parties in the conflict" either. This complete silence reflects the fear of many Governments that mere reference to an adverse party in specific circumstances will be interpreted as a form of recognition of that group" (Kalshoven and Zebveld, 2005, p. 156). Furthermore, the protocol only provides for one possibility of developing a CANI: between the armed forces and a GAO, removing the possibility that even extensive fighting between several armed groups without the involvement of government forces could be considered an armed conflict.

However, the international custom has shown that armed conflicts can develop between two GAO's and it is of the utmost importance to use legal frameworks that regulate these situations from the perspective of the environment in which they take place. Therefore, when we speak of GAO's, we are talking about non-international armed conflicts (CANI) which can be of two types: Armed Forces against a GAO or GAO against another GAO; four fundamental elements must be fulfilled for it to enter the category of CANI:

– One essential definition is that of armed *force* or *violence*.

- A temporary one which is the *prolongation* in time.

- The *organisational* element of the group participating in the conflict.

- The inclusion of armed conflict *between groups* alongside the traditional notions of international - between states - or non-international - the armed conflict between state authority and the armed group. (Salmón, 2012, p. 30)

When talking about the existence of armed violence, military operations - or those that can be taken as military - are necessary for a limited time, produced by a group that meets the required levels of intensity and organisation, and there must be confrontations with another group of the same characteristics or with state armed forces.

When a CANI takes place between armed groups, it should be seen that "when faced with a group with its characteristics, there are others with the same tendencies, the same development. Each group considers itself autonomous and with the free exercise of its rights, is limited to a specific territory, and does not consent to the interference of the others in what it believes to be its particular direction. (Alcorta, 2009, p. 3)

When he talks about:

A conflict must have a duration in time, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (TIPY) has changed this term by intensity, explaining that it then requires a level of organisation and violence for a conflict to be considered as non-international. (Sassóli, Bouvier and Quintin, 2011, p. 23)

Another way to identify a CANI, according to the Correlates of War Project of the University of Michigan (COW), is to consider that there are armed combats in the territory of a state, involving the state and other organised forces, there are at least a thousand deaths related to these combats, of which the weakest actor caused at least 5%. (Valencia, 2013, p. 99)

Since these elements are minimum requirements to reach a level of intensity that allows IHL to be the legal framework, this is based on the fact that in the law of war killing the adversary is permitted, although it is proposed, through the Martens clause, that:

> Both the national government and the non-State armed groups must abandon the attitude of reproach in the face of their adversary's conduct and begin to recognise in the other, their enemy, and the innocent third party outside the conflict, a human being who has the right to be a person. (Valencia, 2013, p. 19)

One important thing when talking about GAO's is to determine the status of the interveners since obviously we cannot talk about combatants since we are not in an IAC; however, those who are part of a GAO must:

- Carry weapons openly and visibly.
- Have clear identification, which may be a uniform.
- Have a hierarchically superior person, i.e. a GAO must have a command structure, and
- They must respect and be bound by IHL.

These characteristics help to make a clear distinction between those who take part in hostilities directly and those who do not. It is necessary to clarify that not all those taking direct part in hostilities are members of a GAO, as they may be civilians who, for a given time, have supported one or other of the armed forces with individual acts that have had a given threshold of harm, direct causation, and a nexus of belligerency.

Since the action of a GAO is allowed to influence the reality of a country, and it seeks to give obligations to its acts

to defend the rights of those who do not take a direct part in the hostilities, "organised armed groups are considered 'parties' to an armed conflict, regardless of any formal recognition of belligerency by the opposing state" (Melzer, 2016, 53). It is the first moment in which they are seen as subjects of international public law, although this condition does not allow them to participate in the creation of norms or international conversations proper to states. Therefore, "this recognition does not imply that they are legitimate or have full legal personality under international law" (Melzer, 2016, p. 54). From this it follows that not having legal personality, they cannot adhere to international treaties, thus giving rise to the first obvious question within IHL, why are they obliged to respect a rule that they have not accepted, considering that, the rest of the subjects even negotiated the birth of such rule?

It can be added that the GAO's are not the only accepted subjects of international law that do not constitute States since we can also find international organisations, non-governmental organisations, transactional businesses, civil and religious associations, and even insurgent and terrorist groups that currently have an impact at the international level. However, they are not clearly defined within the rules governing individual relationships.

Furthermore, one of the most relevant parts of the IIAA that concerns this work is the visualisation that an adverse party does not arise when talking about armed conflict, which leads us to ask whether it is binding on non-state parties to a conflict (Kalshoven and Zebveld, 2005, p. 156)

In conclusion, it has been determined that the rights and obligations that have been granted to organised armed groups by states to ensure compliance with international rights and norms effectively make them subjects of international law, which places them on an equal footing, within an armed conflict, with state forces. However, it is imperative to determine under what conditions these parties to the conflict are obliged to comply with the norm since under no circumstances do they have the capacity to negotiate, create, sign or ratify norms of international law.

2. STATE OF THE ART AND NON-INTERNATIONAL ARMED CONFLICTS.

Non-international or internal armed conflicts have a clear origin since the end of the Cold War, as it was in this period that citizens started to organise themselves to defend their ideas, such organisation quickly led to clashes between state forces and newly formed groups. Although this reality is now ordinary among the population, it was quite radical at the time because it was not normal for a group to organise itself to go against the State. Then, the clashes were between a dominant and sovereign State against a poorly organised group with limited weapons equipment, this being one of the reasons why the CANI regulations are so recent and respond to the interest of States seen as international legislators. (Melzer, 2016, p. 30)

When defining the CANI, in order to understand the context in which they are developed and how the international community sees them, we can find conventions, jurisprudence, customs and doctrine.

2.1. Conventional Law for International Humanitarian Law

"From 1949, rules were also drafted for internal armed conflicts, the signing of multilateral treaties being a prerogative of States, as the main international legislators" (Kalshoven and Zebveld, 2005, p. 17). In 1949, the Geneva Conventions were born as a primary source applicable in armed conflicts and obligations began to be developed for armed groups that emerged as a contradiction to state forces. As mentioned above, international norms are created by the will of states; however, they are binding on individuals, that is, their citizens, as they are the ones who grant state sovereignty.

Thus, "with the adoption of common Article 3 of the 4 Geneva Conventions, the position in which the CANI are presented as internal problems of the States changes radically, establishing minimum guarantees of respect for life in these situations" (Sassóli, Bouvier and Quintin, 2011, p. 22)—beginning in 1949 a modern IHL. Thus, it includes subjects of international law whose actions concern the whole community and tacitly imposes on them the duty to respond to that community.

Within the international conventions, the CANI is governed by article 3 of the Geneva Conventions and Additional Protocol II of those conventions.

When talking about international treaties, it is essential to understand the procedure that these must go through before they become a binding rule for a state. Therefore, while a state does not sign a treaty, it is not a party to it since “a treaty applies to the Parties that have approved it, and is not necessarily annulled by a subsequent treaty on the same subject, the situation that often arises is that some states are parties to the new treaty, while others are only parties to the previous one” (Kalshoven and Zebveld, 2005, p. 19). Then, it can be understood that while the Geneva Conventions are one of the most widely accepted and approved international instruments within the international community, Additional Protocol II has not had the same acceptance, as it tacitly represents an acceptance by states of a failure to deal with internal problems. However, the most significant number of norms contained in this body of law is part of international custom, which, as will be analysed below, in the absence of a persistent objector, is binding on all states.

“Only the Additional Protocol to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts sets out the requirements for the application of that treaty, which does not imply a general definition of armed conflict or a scheme that must necessarily be followed in all cases of non-international armed conflict” (Salmon, 2012, p. 29). For this reason, the requirements of control of territory, organisation and identification are not the only requirements that a GAO must comply with within a non-international conflict, nor do they represent as such, a limitation to categorise an organised group as a GAO, considering that, by granting it this status, IHL begins to rule as it is the special rule.

When speaking of compliance and respect for IHL rules, it should be understood that “IHL rules are rules of an erga omnes nature because States have assumed a dual obligation to respect and ensure respect for IHL rules” (Salmon, 2012, p. On the other hand, when speaking of the obligation to ensure

respect, it is understood that the international community influences the actions of a State, since, in the case of a violation of IHL, it is the high contracting parties who must demand compliance with the responsibilities set forth.

As in any context, the laws of war have been violated for several generations, so mechanisms have been implemented to demand respect for them, since "as with all areas of law, failure to comply with the rules cannot lead to the conclusion that they should disappear; on the contrary, measures should be taken to promote and ensure compliance" (Salvador Lara, 2018, p. 124). Thus, the States Parties to the Geneva Conventions are obliged to respect the conventions and educate their citizens so that, being aware of IHL, they promote its compliance. Article 1 of the Geneva Conventions promoted this obligation, an article that has now become part of international custom.

Several authors have identified and fixed by Article 3 of the 1949 Geneva Conventions as the essential rule of IHL since in addition to setting rules for the management of the CANI. It determines the conduct that the parties to a conflict should have concerning persons not directly participating in the hostilities, since "a contrario sensu, the persons not protected by common Article 3 are those who take a direct part in the hostilities". (Valencia, 2013, p. 175)

When a CANI was developed, the participants began to wonder whether "the Geneva Conventions would apply in their entirety to internal armed conflicts; however, this question was also expressly answered in the negative" (Kalshoven and Zebveld, 2005, p. 44). It leads us to limit the obligations of the GAO's, thus encouraging States to have more commitments to the international community by having a responsibility to care for the actions of their citizens. However, it is a responsibility that arises because no state is prepared for the Geneva Conventions to become rules of armed conflict since they would become responsibilities for both parties.

2.2 Customary law as a source of international humanitarian law

Before the rules contained in international treaties became favourable, customary rules were the ones that States were obliged to respect, which is why "at the same time, it is reaffirmed that, increasingly, IHL rules are considered customary and, as such, rules that must be applied by all States based on universality" (Salmon, 2012, p. 38). It seeks to promote respect for rules that have been practised throughout history, creating responsibilities for those who are not obliged to comply with them and expanding the margins of regulation over which the international community has the capacity to intervene.

As already mentioned, "treaties are only binding on the contracting parties; but a series of treaties between different states may perhaps determine the same principles and accept common solutions" (Alcorta, 2009, p. 126), giving way to a new form of rule development. Then, it allows states that are not bound by a treaty to have an obligation to respect those rules for the purpose they have, which, in the case of IHL, seek to preserve the species, act with humanity and respect basic rules so that war has limitations.

In a CANI, one of the most relevant sources of IHL is international custom, since as we have seen, written treaties are limited when developing this type of conflict, being:

> Customary law which is vital in protecting victims when one of the parties involved in the conflict is not a party to the treaty, the application of custom is a preference of international courts since it is also the only way to apply international standards in some countries. (Sassóli, Bouvier and Quintin, 2011, p. 61)

The first is based on the fact that State practice must be sufficiently abundant for it to be recognised at the regional or international level as a uniform and many acts, which is accompanied by the opinion juris, i.e., those who comply with this act are convinced that their action is because it constitutes a legal obligation and that if they refrain from complying with it. Then, it could give rise to responsibility before the international

community. Thus, the custom is binding on all states except persistent objectors, which are states that have entirely rejected the practice from the moment of its creation, so there is no acceptance or conviction that such action represents a norm.

Because of this, it follows that international custom, it becomes a means of ensuring that war is waged based on the principles of humanity and distinction, the fundamental bases of a just war. “However, the content of customary rules is less clear, and it is necessary to examine this practice extensively and carefully in a context of poor compliance”. (Salmon, 2012, p. 55)

Organised armed groups throughout history, participate as subjects of international law in an exceptional situation such as an armed conflict. Within this participation, they have shown respect for a practice that has been approved by States.

This tacit acceptance, which is seen in the practice of the GAO, makes the customary rules applicable in the CANI and produces an evident advantage in the international community because, “IHL is a dynamic legal body that is determined by the practice and opinion of States, with custom emerging as a means of rapid adaptation to new challenges that an international treaty would not cover for the time it takes to negotiate”. (Melzer, 2016, p. 22)

The International Committee of the Red Cross has developed a document with the customary rules accepted by all States parties to the Geneva Conventions, Valencia (2013), mentions that the importance of having a clear list of these rules arises from the fact that:

> Initially, this qualification allows it to require individual States to respect specific humanitarian standards that are based on international instruments that have not been adopted in their domestic legislation. The second is that it allows specific treaty rules of international armed conflict to apply to non-international armed conflicts, and the third is that it allows certain customs of war that are not regulated by any international

instrument but must be observed by the parties to an armed conflict to be identified. (p. 75)

Consequently, the ICRC's work is extremely relevant as it is the guardian of IHL, and by mandate of the Geneva Conventions, it is responsible for identifying cases in which international intervention or specific humanitarian aid is required.

Thus, even when a CANI is being developed, the ICRC can intervene to visualise the conditions of those detained because of the conflict or of civilians who have been captured. Furthermore, respecting the principles of the movement, it can adapt its behaviour to the needs of a specific population.

2.3 International Humanitarian Law developed in the doctrine

For its part, legal doctrine has characterised a CANI, mainly on the basis that: "a) the parties to the conflict are not State[s]; b) armed confrontations take place in the territory of a State; c) open hostilities must have a minimum of the organisation; and d) armed confrontations must have a certain intensity" (Salmón, 2012, p. 131). As we can see, there is a general definition of a CANI, since all international law sources determine minimum characteristics and the existence of an armed group that has levels of intensity and organisation, which carries out armed confrontations that can be seen as attacks with military purposes within a territory that does not necessarily have to be controlled by that GAO, but which must be seen as having control over some territory within the State where the conflict is taking place.

Within a CANI, it is vitally important to determine the role of the State, the role of the armed forces and the role of the groups that are developing within a situation, because, effectively, a disadvantage is visualised among the subjects that may become involved in this type of conflict; thus, "international law can be one, but on the condition that it is such a law, that it is formed in all its parts as a logical and precise deduction from the principles and not as the arbitrary

policy of the States" (Alcorta, 2009, p. 5). It calls for States to attend to the needs of the population as a means of preventing internal armed conflict, but if this attention is late. An activity is developed that cannot be managed, the country where the conflict is taking place is obliged to comply with international norms neutrally because its citizens are still being talked about, even when they are fighting against the State armed forces. With even more reasonable when it is a confrontation between GAO's since in this case, the State must act as a mediator to seek an effective solution to the conflict and oblige the parties to respect the rules of IHL in all areas.

As we have already discussed, IHL seeks to protect individuals who are not directly participating in hostilities or those who have ceased to participate in hostilities. This rule is the basis and method of development of an action that preserves humanity and respect for life. In this context, international human rights law is involved, which emerges as a normative framework applicable in times of peace and, subsidiarily, in times of war.

"IHL and International Human Rights Law (IHL) share, despite the existing differences, a common philosophy that consists in the preservation and protection of the human being" (Salmon, 2012, p. 32), this makes us understand that, in front of any situation, human life will always be protected, so every action of the international community and a specific State must be directed to such purposes.

Another of the fundamental differences between IHL and IHL is that "while the former imposes a duty of respect on the parties to the conflict, the latter imparts a duty of respect and guarantee at the head of the State. Therefore, IHL is not merely linked to the State, but rather it overcomes this barrier to control the behaviour of groups that may not be recognised by a government. (Valencia, 2013, p. 129)

In this context, it is understood that it is the IHRL that binds the State in a situation in which it may not be intervening, to ensure that human rights are fulfilled and that there are no

violations of international norms. On the other hand, IHL appears as a normative framework that sets limits and means for the behaviour of specific groups in a given situation.

One of the essential sources in IHL are the principles that apply in the conduct of war and the behaviour of the parties in these situations, the most representative being humanity, military necessity, proportionality and distinction.

Military necessity and humanity are the fundamental basis of IHL because "under the principle of military necessity the parties may resort only to those methods and means which are necessary to achieve the legitimate military objective of conflict and which are not otherwise prohibited by IHL" (ICRC and IPU, 2018, p. 10). In other words, the parties are allowed to use force as long as these acts bring them closer to their objective, in other words, help them win the war as quickly as possible, giving rise to the principle of proportionality, which states that incidental and superfluous damage must be weighed in the balance with a military advantage, and only when the latter has more weight can an action be said to have been legal under IHL based on the principle of military necessity.

Within humanity, there must be an understanding that there is a "prohibition on the parties to a conflict from inflicting suffering or causing destruction that is not required to achieve the legitimate objective of a conflict" (ICRC and IPU, 2018, p. 10). It follows from this short definition that the principle of humanity seeks to respect human dignity and to maintain those intrinsic characteristics of the human being, with his life being a right protected by maximum standards.

The principle of distinction is based on determining who actively takes part in the hostilities and who are the persons affected by the armed conflict that is taking place, and therefore obliges the parties to have elements that distinguish them from the civilian population and that each of their attacks is directed at military objectives and combatants; civilian objects and citizens are protected by international treaties and norms.

In conclusion, it should be understood that "the difficulty encountered in improving the protection regime in non-international armed conflicts is the obstacle posed by the principle of state sovereignty" (ICRC, 2008, p. 17) since no state or government is ready to accept that it may have internal problems with its citizens and that these problems may exceed certain limits.

Also, organised armed groups are obliged to comply with the norms of IHL, and with all the sources that have been developed in this text, even if they have not been part of the negotiation, creation or ratification of the same; a topic that will be developed below since it is vital to determine the reasons for a GAO to practice and respect these legal bodies.

3. ORGANISED ARMED GROUPS ARE OBLIGED TO RESPECT INTERNATIONAL HUMANITARIAN LAW

As we have already seen, organised armed groups are subjects of non-international armed conflicts. However, there are no elements that link the GAO's with respect and obligations concerning International Humanitarian Law, which is why, within this margin, it must be understood that States and groups, from the moment, that hostility between the parties begin must seek to ensure that the principle of humanity is visualised in each of the acts that they carry out.

History has shown us how members of an organised armed group have responded before international courts for crimes committed in the CANI. It leads to a definite conclusion: individual responsibility arises, in fact, from non-compliance with treaties and conventions, and therefore there is a tacit obligation on citizens to respect the rules set by the States.

Initially, "the obligation to enforce IHL is a rule erga omnes, that is, it creates obligations vis-à-vis the international community as a whole, and all States have the right to invoke State responsibility in case of the breach" (Salvador Lara, 2018, p. 125). In other words, states must educate their citizens about IHL so that, if a GAO is formed, they are in a position to respect the minimum standards and, to develop a conflict with

the minimum guarantees of war. Otherwise, the state will be responsible for each of the violations carried out by its citizens before the international community, since all contracting parties can request that a state be responsible for violations of the law of Geneva, The Hague and New York.

It should be understood that IHL is not synallagmatic, since "the duty arising from Article 1 not only entails synallagmatic obligations between States Parties but obligations to all persons under their jurisdiction and outside their jurisdiction". (Salvador Lara, 2018, p. 126), therefore, it obliges all individuals who are nationals of a signatory State, or those who work in the territory of a signatory State, to comply with the rules of IHL and at the same time, it requires that these individuals ensure the compliance of third parties. Without a doubt, this is a way to bind the GAO in the fulfilment of the obligations outlined in international treaties that regulate war; however, it is not a sufficient reason for an individual and his group to accept that a State can judge them for their acts or that even a State with all the power it has treats them as its equal, facts that occur in war.

Initially, in order for the regulations to be known and complied with by a group of nationals, they must be positive in their internal regulations, that is, "the implementation of IHL could not be complete if the sanctions for non-compliance with its stipulations were not regulated at the national level". (Salvador Lara, 2018, p. 133). When a norm is found in the internal regulation, it facilitates the knowledge of the people who are under the norm, and by knowing a fact and its consequences, the people will avoid carrying out the actions typified so as not to have responsibilities.

Before continuing, the figure of universal jurisdiction must be understood, since from this figure arises the sole obligation that states have to judge those responsible for the four crimes regulated by the Rome Statute (genocide, crimes against peace, crimes against humanity and war crimes). Universal jurisdiction states that the state where the perpetrator is a national or where the crime was committed has preferential jurisdiction to judge the crimes he or she has committed;

but, if the state is not in a position to judge because it cannot (domestic rule does not contain the criminal type) or because it does not want to (the state runs the justice system), one of the state parties can bring this case to the International Criminal Court so that it can judge the citizen for his or her acts.

It follows that a State, as such, does not have an express obligation to criminalise the crimes outlined in the Rome Statute; however, this does not eliminate the responsibility that its citizens will have for the conduct committed since in no way does this lack of domestic legislation represent a condonation, but rather an impossibility of domestic prosecution.

3.1. A people's law that regulates behaviour

The conventions, treaties and written rules governing armed conflict have been criminalised in recent years. In ancient times, it was customary to determine the ranks in which people could participate in armed conflict and to determine how war should be waged.

One of the principles that remain is that specified by Kalshoven and Zebveld (2005) in their work, since all cases that the rule did not provide for should be regulated by the principles of the law of nations, regardless of whether they were civilians or combatants, since these responded to civilised nations, the laws of humanity, and the demands of the public conscience.

Today it is remote to find the terms with which the norm differed in antiquity, but by understanding the environment it is known that when speaking of civilised nations one spoke of those countries that were not under a colonising power, so they could make their own decisions and develop them. The law of peoples is linked to handling these areas because, it is the right of foreigners who develop in national territory, how they were seen in antiquity to organised armed groups, as it was considered that, having conflicts with their state, they felt foreigners in their homeland.

3.2. What about organised armed groups?

It should be understood that there is no way for a GAO to be involved in a negotiation regarding the creation or development of a treaty, as this is an exclusive attribution of States. Therefore, since they do not participate in this part of normative development, and since they are groups contrary to the ideology maintained by the State, there is an apparent conflict in determining what kind of obligations they have.

Moreover, “Governments are seldom willing to recognise insurgent groups as official parties to the conflict, even as a separate entity” (Kalshoven and Zebveld, 2005, p. 81). This recognition would lead to a tacit acceptance of the internal problems that states have and of the lack of control that the armed forces have over the handling of power and state sovereignty, making it difficult for a state, of its own free will, to classify a union of people as an armed group, considering the aspects that this would include.

As states are responsible for the actions of their citizens, they are also responsible for the actions of combatants opposed to the national armed forces, therefore “armed opposition groups engaged in an internal armed conflict must necessarily assume responsibility for the violations committed by their members”. (Kalshoven and Zebveld, 2005, p. 166)

3.3. International agreements or custom

It should be understood initially that, in international relations, the principle of reciprocity is prohibited, since no state can argue the use of force as a means of revenge for the attacks it has received, although in some instances the United Nations Charter allows it.

In this margin a:

> The first possibility to explain why GAOs are bound by IHL, this is because it includes provisions that each party to the conflict must respect because they are

> created by agreement or custom, where States have given international legal personality to GAO's so that they have rights and obligations under those rules. (Sassóli, Bouvier and Quintin, 2011, p. 251)

With this it should be understood that by international custom or by agreements between states, it has been decided that the GAO can be considered as an international subject in the face of armed conflict, this to maintain a regulation that effectively protects the citizens of a given country and that, furthermore, regulates the means and methods that can be employed from both parties to a conflict so that the objectives for which they are fighting are obtained in an equal manner.

Although custom has shown that both the armed forces and the armed groups have applied the provisions mentioned in Additional Protocol II, the option should be considered that these groups may go against the principles set out. It should be made clear that this does not entitle the State to breach the obligations that have been developed by the Geneva Conventions and their signing, The ICTY is clear when it mentions that "humanitarian law is not based on a system of bilateral relations but establishes a set of absolute and unconditional obligations, making the principle of reciprocity irrelevant" (Salmon, 2012, p. 128). It makes clear the obligations of the parties, the rights that must be respected, the responsibilities that must be met in the event of a violation of the rule and, besides, establishes how the international community must respond in the event of a State's failure to comply.

This reason that compels the GAO is born from the idea that international law is based on a rational law in which nations must accept and apply a law that regulates the development of its very nature since it would be entirely illogical for human beings to seek to end their species due to a lack of regulation or lack of consensus between parties that are handling a situation with excessive hostilities (Alcorta, 2009, p. 34)

Another principle that has determined international custom is that members of armed groups who are fighting as a party away from the state lose their civilian status and can

be attacked under the same conditions as a combatant, i.e. for the principle of distinction, these people are called unprivileged combatants and therefore become a valid target for combat. It is a reason to oblige oneself because it allows them to attack State armed forces under the same conditions and that this assures them that after the conflict, they will not be able to be judged for crimes that as civilians they could be found responsible for, since it must be understood that, in war, the right to life is limited when it comes to parties and combatants in a mutual hostility environment.

3.4. As citizens, we respect the decisions of our state

One of the arguments put forward by the doctrine is based on the fact that an organised armed group has been formed with the intention of fighting and achieving objectives that benefit the whole community, therefore, in their eagerness to achieve this they do not need to go against their population. It has been a much-discussed issue since reality has shown us that they do not necessarily seek to make their population well, but as an armed group, they seek means to survive in a conflict scenario.

Sassóli, Bouvier and Quintin (2011), argue that a State has power over the rules that are imposed on citizens living within a specific territory, which results in them being able to enforce IHL rules effectively. (p. 252)

In this way, it can be understood that IHL effectively coexists with domestic legislation that manages the internal order and has the power to prosecute all persons who violate the rules and then to give a punishment that reflects the coercive power of the State but helps a country to function correctly.

The duty, right and need for the International Committee of the Red Cross (ICRC) to intervene can be reflected within the internal rules since it has the power to teach citizens the basis of these rules and to encourage small groups to act on the principle of humanity, which is necessary for the human losses on both sides to be assessed in similar terms.

Salvador (2016) determines that IHL applies to armed groups because its members are obligated as individuals (p. 7), that is, if a citizen does not comply with the Rome Statute, he or she will have to answer for one of the four crimes, in this case, it will be the war crime, thus having obligations that arise directly from IHL.

In this sense, it is essential to establish that the jurisdiction of a country is born from the membership of a citizen, from the place where the crime was committed or from the specific "universal jurisdiction", which refers to that, the most affected State has an obligation to prosecute and judge those persons who committed an international crime; however, there could be reasons for not wanting or not being able to do so. Therefore, any State can judge a person regardless of the nationality of the accused or the place where the crime was committed.

Therefore, international treaties would bind members of organised armed groups because they are part of a sovereign population that has ceded individual freedoms to the state to regulate the behaviour of society.

This theory has a small conflict as defined by Professor Ryngaert since to accept a jurisdiction it must accept state representation, and if we accept that representation, why have we formed an organised armed group, being a somewhat illogical reason but still convincing concerning what practice has shown us in recent years.

3.4.1. Colombia, an armed group and a revolution

Currently, Colombia is the only country in the Americas that has an internal armed conflict, and it is essential to determine this point due to the number of internal disturbances that have been reflected in the area.

Within this armed conflict, the least privileged have been civilians and citizens who have been part of all the acts carried out by guerrillas who seek to terrorise the population so that, initially, they do not count the strategies to state members and subsequently, so that they do not find another solution but

to be part of the conflict and have the necessary protection for the development of their lives.

Colombia is an exemplary country in specific actions for the conflict that is developing in its country since it has effectively admitted having a CANI and has decided to apply the rules of IHL with the response and care from the ICRC, which leads to what Valencia (2013) catalogues as "late responsibility" since if a government has been unable to avoid internal armed conflict, must at least assume responsibility for establishing order and justice by legitimate means, respecting the life and inherent rights of the human person, protecting and alleviating the fate of the victims of a conflict that should always have been avoided. (p. 133)

It leads us once again to question what motivates non-governmental forces to respect IHL. Although there is an erroneous reason for these situations, namely, reciprocity, which, as we have already mentioned, does not respond appropriately to IHL and cannot be applied in wartime conflicts, an armed group respects its opponent because it needs to be respected. Moreover, a GAO is the only one who has the capacity to observe the behaviour of its opponent in order to denounce it, so there is a mutual care that facilitates the development of war within humanitarian terms.

3.5. Who has territorial control?

It is essential to understand that when an armed group is formed, it must comply with a requirement in order to be considered as such, a requirement that is to have territorial control in a given area, so these groups need to determine what territorial control entails arises.

The control must be seen as the power to make decisions that favour a given group and that, also, make it possible to fulfil objectives that have been set at a given time in civilisation. It is necessary to understand that the population allows part of its freedoms to be transferred to the State in order to have favourable control.

When we speak of territorial control as such, we are referring to a capacity that initially only corresponded to the States, since they had the power to determine what actions would be developed in an area in order to comply with the needs and objectives of a civilisation.

It is why "armed groups that exercise de facto control over territory, by behaving as states, must assume the same international obligations that are attributed to the states themselves, including those established in IHL" (Salvador, 2016, p. 7). Thus, one more reason arises for the GAO to respect and comply with rules of an international nature that allow civilisation to develop even in an environment where it may be challenging to understand what civilisation is seeking.

CONCLUSIONS

Armed conflicts, as we have seen, are part of our history, and they continue today in various forms.

International Humanitarian Law seeks to regulate and humanise war by visualising the current need for effective control and the preservation of humanity.

In an armed conflict, there are various participants, with States being the most popular and organised armed groups the newest. There can be international armed conflicts between two or more states, and non-international armed conflicts in which one of the parties may be a state and another party an organised armed group or where both parties are an organised armed group as long as it takes place on the territory of a state.

An armed group must meet the parameters of intensity and organisation. The organisation is measured by the internal hierarchy within the group, by the denomination they use to differentiate themselves, by the uniform and because they openly carry weapons. On the other hand, the intensity is measured by the fact that there must be conflicts over time, the number of victims that these conflicts produce and because they have control over a specific area that leads them to carry out their military operations and recruit citizens effectively.

When talking about organised armed groups, we have been able to conclude that they are considered as subjects of Public International Law at the moment of complying with the norms that are set forth, even though they are not a State, nor do they have the capacity to negotiate for the elaboration of a norm. However, this determination has been the result of several years of conflicts where States have had to give their hand in order to comply, since it is unacceptable that a group, within a State territory, can exercise force without being part of a State entity. This determination has led to the regulation of conflicts in all their forms and to the search for adequate protection of civilians, who should not suffer the damage of war, as far as possible when considering the situation.

As they are considered subjects of the DPI, they must respect and oblige themselves to act by international law, as they can be judged by international courts for all acts that are contrary to the rules drawn up. Since it is necessary to determine the rules that must be considered in a non-international armed conflict, it should be mentioned once again that the law of the Hague, the law of New York, article 3 of the Geneva Conventions and the Second Additional Protocol to the Geneva Conventions are the rules that regulate these particular situations, which are also part of the treaty law that has accepted the participation of organised armed groups as a subject and a party to an armed conflict, with their rights and obligations vis-à-vis international actors or actors with similar conditions.

International custom, as a source of IHL, has shown that organised armed groups have complied with the rules laid down from the time of their creation, without the existence of a persistent objector, so they must respect the general rules and ensure that their actions are proportional and humanitarian, avoiding causing harm to civilians, which is the reason for developing means of protection.

Finally, organised armed groups have obliged themselves to respect IHL for specific reasons listed below.

1. As a rule erga omnes, it requires the whole international community to respect it. Therefore, States have an obligation to educate their citizens in the minimum respect of the rules for the conduct of the war, thus ensuring that citizens are aware of how they should act in case of such a situation.
2. In the past, organised armed groups were seen as foreigners, even if they were in their land, and were therefore regulated by a law of nations. Today, international law, in regulating international relations, is considered to be the one that should consider and regulate the relations that may occur in international and non-international armed conflicts, since this form is the most impartial and transparent.
3. By custom, States have allowed citizens to unite to defend their interests when the right to assembly has been exceeded, they have indirectly responded with force to the force that is presented, so it has been admitted that certain groups can become a subject that confronts the State.
4. The organised armed groups are formed by citizens of a state who should respect its internal legislation (considering that the rules of war in most cases are already regulated in each country's regulations) and to accept the jurisdiction of the state in which I have developed.
5. Armed groups are taking on responsibilities that primarily correspond to States; therefore, they must respect the obligations that States have acquired internationally concerning the territory they control and the actions they exercise there.

In other words, there are clear reasons that link organised armed groups with the international responsibility to which they are a party in the event of non-compliance with an international norm, a responsibility that arises from the tacit obligation they have towards IHL.

RECOMMENDATIONS

As we have already seen, there are sufficient reasons for organised armed groups to respect IHL; however, there are not enough rules to determine the ranges in which they should operate during an armed conflict. It could translate into a tremendous legal vacuum, since, although the customary law binds them, since those who sign, ratify or negotiate a treaty may refuse more intensely to comply with unwritten rules.

Within this margin, it is recommendable that a rule is developed which establishes that, throughout history, organised armed groups have already acted as a subject and party within an armed conflict. For this reason, they should be given the necessary recognition to ensure that the rules of war are fully complied with, all the while considering that, although they are not part of the treaties as such, receiving such recognition would empower States to care for their civilians sincerely as this type of situation is seen to develop.

The doctrine, for its part, has developed an issue that has been quite difficult for States, so using it to develop the rest of the sources of public international law could motivate the development of a complete legal framework that responds to all the needs raised.

Organised armed groups do have reasons and causes for responding positively to IHL. By clearly understanding them it is possible to determine the aspects to be improved and the laws that should be developed to fill the legal gaps that do exist, this as a more suitable means of conflict resolution where the law is respected by each of the parties to a conflict and where the lives of citizens can be seen and taken into consideration as the highest duty of protection that a State has, since it is civilians who allow the State to exist.

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Valeria Monserrath Sánchez Morales: Independent legal researcher

Email: monse-2498@hotmail.com

Country: Ecuador

City: Quito

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Volonté, droit Civil et Neurosciences

Will, Civil Law and Neuroscience

Voluntad, Derecho Civil y Neurociencias

Monica Vinueza Flores
Titulaire d'un Master Droit de la Santé délivré par l'université de Bordeaux.
Ville: Quito
Pays: Ecuador

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RÉSUMÉ : Que ce soit dans le domaine du droit public ou du droit privé, la volonté est une notion qui imprègne le droit, et pourtant elle ne peut être saisie par le droit sans recourir, pour l'instant, à la philosophie. Ce n'est qu'à partir des éléments apportés par la philosophie que la volonté juridique a pu être construite. Toutefois, avec l'essor des neurosciences, notamment à partir du XXI^e siècle grâce aux progrès de l'imagerie cérébrale par résonance magnétique, elles pourraient apporter une réponse concernant le substrat biologique de la volonté. Visant ainsi à expliquer la façon dont le système nerveux central produit les processus mentaux, les neurosciences touchent des attributs essentiels de la personnalité et de l'identité de l'être humain, telles que la capacité, la volonté ou l'autonomie qui sont pris en compte par le droit et notamment par le droit civil, dans ses institutions juridiques. C'est pourquoi les recherches en neurosciences pourraient avoir un impact sur les actes juridiques où la volonté joue un rôle primordial.

MOTS CLÉS : droit civil, droit des contrats, cerveau, neurobiologie, prise de décision.

ABSTRACT: Both in the public or private domains, a will is a notion found in all aspects of the law, though it cannot be understood for the time being without invoking philosophy. It is only with such elements provided by the philosophy that

constructing the juridical will was made possible. Nevertheless, with the growth of neurosciences, especially in the 21st century with the development of magnetic resonance brain imaging, an explanation of the biological substrate of a will could be provided. By attempting to explain how the central nervous system produces mental processes, neuroscience deals with essential attributes of personality and the identity of human beings such as capacity, will or autonomy, which are considered by law, especially civil law, in its legal institutions. It is why the research on neurosciences could have an impact on the legal acts where will plays a vital role.

KEYWORDS: civil law, contract law, brain, neurobiology, decision making

INTRODUCTION

La volonté a fait l'objet de plusieurs études dans tous les domaines de la science. Étymologiquement, le terme volonté vient du latin « *voluntas* » ou « *voluntatis* » signifiant « vouloir » ainsi que la « faculté de vouloir ». Dans son sens commun, la volonté est « la disposition mentale ou acte d'une personne qui veut [ainsi que la] faculté de se déterminer librement à l'action, en pleine connaissance de cause et après réflexion » (Robert, Rey & Morvan, 2019). La volonté peut être définie également comme la « puissance intérieure par laquelle l'homme et aussi les animaux se déterminent à faire ou à ne pas faire » (Littré, 1963, p.1359).

Si on se réfère à la définition espagnole du terme, la volonté est « la faculté de décider et de prescrire sa propre conduite impliquant, par conséquent, le libre arbitre et la libre détermination de la personne »[1] (Real Academia Española Madrid, 2014).

Dans le droit, la volonté est une notion omniprésente et le droit civil, notamment, a fait de la volonté sa clé de voûte. Le Code civil comporte au moins cinquante références à la

1 C'est nous qui traduisons.

volonté, cependant il n'en donne pas de définition. C'est à partir des éléments apportés par la philosophie et la médecine que la volonté juridique a pu être construite.

L'essor des neurosciences, à partir du XXI^{e} siècle, et notamment les recherches sur la prise de décisions, nous porte à nous demander si ces recherches pourront avoir un impact sur le droit et plus spécifiquement sur le droit civil. En conséquence, nous n'aborderons ni les implications des neurosciences sur le droit pénal ni sur le droit de la santé. Il n'en pas question non plus d'entrer dans le débat du déterminisme biologique ou du dualisme cartésien consistant en la séparation de l'esprit, *res cogitans,* du corps, *res extensa*. Nous ferons brièvement référence à celui-ci mais nous ne traiterons pas le débat philosophique sur ce point. Nous nous concentrerons donc sur la notion de volonté saisie par la philosophie, par le droit, et plus précisément par le droit civil à travers le droit des contrats, ainsi que par les neurosciences.

Ainsi nous allons voir dans une première partie que la volonté au sens large est une notion développée fondamentalement par la philosophie. C'est pourquoi nous nous référerons aux grands philosophes qui, ayant étudié la volonté, ont également contribué à la construction de la volonté juridique. En ce sens, nous ne cherchons pas à être exhaustifs et moins encore à approfondir l'étude philosophique de la volonté. Nous nous limiterons à mettre en évidence ces études qui ont enrichi d'une manière ou d'une autre la volonté juridique.

À partir de ces éléments, nous expliquerons que la volonté saisie par le droit n'est pas la simple volonté. Le droit a construit une fiction autour de la volonté : la volonté juridique, une volonté caractérisée qui tient compte tant de la volonté interne que de la volonté déclarée de l'individu ainsi que de sa capacité. Pour cela, nous analyserons la volonté en droit civil et notamment dans le cadre des actes juridiques où elle est la condition *sine qua non* de leur existence.

Nous nous référerons ensuite aux recherches en neurosciences concernant la volonté, que nous associons plus spécifiquement au processus neurobiologique de la prise de décision où nous démontrerons brièvement à partir des études de neurosciences, notamment de neurobiologie, l'existence d'un substrat biologique expliquant la production de ce processus par le système nerveux.

Enfin nous mettrons en évidence quelques réflexions introductoires portant sur les possibles implications des recherches en neurosciences sur le droit civil.

1. LA VOLONTE, UNE NOTION ESSENTIELLEMENT PHILOSOPHIQUE

Qu'est-ce que la volonté ? La philosophie a longtemps essayé d'apporter une réponse à cette question et à d'autres concernant l'esprit de l'individu. Ainsi, la volonté a fait l'objet d'un grand nombre d'études philosophiques qui ont influé sur le droit.

Dans son ouvrage Éthique à Nicomaque (2014), Aristote s'intéresse au caractère volontaire ou involontaire d'un acte. Il conclut que « l'acte volontaire semblerait être ce dont le principe réside dans l'agent lui-même connaissant les circonstances particulières au sein desquelles son action se produit ». Tandis que « ce qui est fait sous la contrainte ou par ignorance est involontaire » (p.61). La volonté est donc action, action qui est le résultat d'un choix préférentiel fruit de la délibération et de la raison, il s'agirait d'une décision délibérée d'agir. Il n'y a donc point de volonté libre sans délibération impliquant une certaine réflexion.

Comme le signale Ricœur (s.d.) cette analyse d'Aristote est extrêmement riche, car :

> la volonté, d'une part, s'enracine dans la vitalité, dont l'énergie alimente les motivations de l'agir humain ; d'autre part, elle participe à la rationalité, qui, en se joignant au désir, se fait raison pratique, comme

> on le voit dans la théorie du « syllogisme pratique », qui est un raisonnement et un calcul du désirable. Aussi peut-on voir dans la philosophie de la volonté d'Aristote l'ancêtre à la fois d'un « volontarisme », qui met l'accent sur la force de l'agir et sur l'initiative du choix, et d'un « intellectualisme », pour lequel seule une volonté éclairée par des motifs rationnels est proprement humaine (paragr. 6).

Ainsi, en mettant en exergue cette dualité d'actes ainsi que la délibération et la raison dans l'action de l'individu, Aristote décrit le processus de prise de décision, toujours en référence à la vertu et ou vice, et forge les bases de la responsabilité juridique.

Saint Thomas d'Aquin reviendra sur l'héritage aristotélicien et conclura que « la volonté est le sommet d'une hiérarchie d'appétits éclairée par la raison, inclinée vers le Bien qui est de l'être » (Blay, 2012, p. 357), il s'agit d'une puissance active caractérisée par le libre arbitre qui « est ce par quoi on choisit le bien ou le mal » et qui « se rapporte à l'acte du choix » (S. Thomas d'Aquin traduit par Kammerer, 2006, distinction 24, sol.3). Saint Thomas d'Aquin liera donc la liberté à la volonté pour élucider la liberté de choix, c'est-à-dire la volonté qui opère des choix et qui agit librement. Il donnera ainsi continuité au débat initié par les stoïciens et poursuivi par Saint Augustin sur le libre arbitre et la prédétermination des actions de l'individu.

Dans les Méditations Métaphysiques Descartes (2010) précise que la volonté considérée formellement et précisément en elle-même :

> consiste seulement en ce que nous pouvons faire une chose, ou ne la faire pas (c'est-à-dire affirmer ou nier, poursuivre ou fuir), ou plutôt seulement en ce que, pour affirmer ou nier, poursuivre ou fuir les choses que l'entendement nous propose, nous agissons en telle sorte que nous ne sentons point qu'aucune force extérieure nous y contraigne. (p. 67-68).

Cette définition amène Jeangène Vilmer (2008) à conclure que chez Descartes « volonté et liberté sont confondues, dans la mesure où la liberté est toujours associée à l'amplitude de notre volonté. Par conséquent, être libre ne relève rien moins que de l'essence de la volonté » (p. 292).

Ainsi, c'est l'amplitude de la volonté qui permet de concevoir et l'entendement de délibérer pour choisir en exerçant notre libre arbitre. On remarquera donc que l'achèvement de ce processus unissant volonté, entendement et libre arbitre donne lieu à une décision, à une action, encore connue de nos jours comme décision cartésienne.

De plus, l'on précisera que Descartes a instauré une séparation catégorique entre le corps (*res extensa*) et l'esprit (*res cogitans*), selon laquelle les pensées, les idées, les affections, l'entendement et tous les produits de l'esprit font partie de la *res cogitans* alors que tout ce qui est une substance matérielle comme les organes ne relèvent que de la *res extensa* :

> j'aie un corps auquel je suis très étroitement conjoint; néanmoins, parce que d'un côté j'ai une claire et distincte idée de moi-même, en tant que je suis seulement une chose qui pense et non étendue, et que d'un autre j'ai une idée distincte du corps, en tant qu'il est seulement une chose étendue et qui ne pense point, il est certain que ce moi, c'est-à-dire mon âme, par laquelle je suis ce que je suis, est entièrement et véritablement distincte de mon corps, et qu'elle peut être ou exister sans lui (p. 92).

La volonté fait donc partie de l'esprit ou *res cogitans*, c'est-à-dire de la substance intelligente, pensante, insaisissable ; et non du corps ou *res extensa* qui est la substance matérielle composée d'organes mécaniques. C'est pourquoi la volonté chez Descartes est immatérielle, insaisissable, un produit de l'esprit et complétement dissociée du corps. C'est l'esprit qui produit la volonté et c'est le corps qui la traduit en action.

Par ailleurs, l'un des apports majeurs de la philosophie au droit, et notamment à la volonté juridique, provient d'Emmanuel Kant. Selon Kant (2020), la volonté est la « faculté de se déterminer soi-même à agir conformément à la représentation de certaines lois. Une telle faculté ne peut se rencontrer que dans des êtres raisonnables » (p. 68). Ainsi, la volonté n'est assujettie à aucun élément extérieur à elle, mais son autonomie lui exige « d'opter toujours de telle sorte que la volonté puisse considérer les maximes qui déterminent son choix comme des lois universelles » (Kant, 2020, p. 90). De plus, la liberté est une propriété de la volonté et la raison, c'est ce qui détermine la volonté. Il n'y a donc pas de véritable volonté sans liberté et il n'y a pas de liberté sans raison. Comme l'explique Daudin (1950) :

> La liberté au sens pratique est l'indépendance du vouloir à l'égard de toute contrainte exercée par des impulsions de la sensibilité, si l'homme à la différence des bêtes a un libre arbitre, c'est que sa sensibilité, en lui, ne détermine pas nécessairement son action, c'est-à-dire qu'il existe en lui un pouvoir de se déterminer de lui-même indépendamment de la contrainte exercée par les impulsions sensibles (p. 221).

Nous verrons que c'est cette conception kantienne de la volonté qui va influencer fortement le droit civil et notamment le droit des contrats à travers la théorie de l'autonomie de la volonté dès le début du XIXe siècle.

Par conséquent, comme nous venons de le voir, la volonté est avant tout une notion essentiellement construite par la philosophie. C'est la philosophie qui a majoritairement conceptualisé la volonté et qui l'a caractérisée. Qu'il s'agisse d'une action, d'une réflexion, d'une caractéristique de l'être humain ou d'un produit de l'esprit, les philosophes s'accordent à dire qu'elle implique une certaine liberté de choisir et d'agir, de même qu'une délibération guidée par la raison, éclairée par l'intelligence et par le discernement.

Ce sont précisément ces éléments ou plutôt ces caractéristiques de la volonté qui ont été prises en compte par le droit afin de construire la volonté juridique, et ont permis de préciser, par exemple, le rôle de la volonté dans les actes juridiques[2], la détermination de la responsabilité juridique[3] de l'individu ou les qualités d'un consentement valable.

À partir de ces éléments nous allons voir à présent que la volonté juridique n'est pas la simple volonté, elle est une sorte de volonté parfaite, saisissable par le droit et étant en quelque sorte stable de manière à ce que soit assurée une certaine sécurité juridique aux relations juridiques des individus. Autrement dit, la volonté saisie par le droit est une fiction juridique.

2. LA VOLONTE EN DROIT : UNE FICTION JURIDIQUE

En droit la volonté n'est pas saisie de manière abstraite. Même si le droit tient compte des éléments philosophiques, sociologiques, anthropologiques et même biologiques, il a construit la volonté juridique par la voie de la technique de la fiction.

Dans un sens général, une fiction est une création de l'imagination. Toutefois, en droit il s'agit d'une technique juridique permettant de créer des situations, des figures juridiques qui ne sont pas nécessairement concordantes avec la réalité. C'est le cas de la volonté juridique. Ainsi, si la volonté pure est une faculté mentale, un attribut inhérent à l'être humain, un produit de l'esprit et est donc changeante et soumise aux passions, la volonté juridique est fondamentalement « une volonté corrigée, artificiellement rendue constante, cohérente,

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2 Le Code civil précise, dans l'article 1129, pour donner un exemple, qu' « il faut être sain d›esprit pour consentir valablement à un contrat » ; et dans l'article 1130, précise que le consentement peut être vicié par l'erreur, le dol et la violence, vices dont le caractère déterminant s›apprécie eu égard aux personnes et aux circonstances dans lesquelles le consentement a été donné.

3 Pour donner un exemple, le Code pénal prévoit à l'article 121-3, alinéa 1 qu' « Il n›y a point de crime ou de délit sans intention de le commettre » et l'article 122-1 exempte de responsabilité toute personne « qui était atteinte, au moment des faits, d›un trouble psychique ou neuropsychique ayant aboli son discernement ou le contrôle de ses actes ».

correspondante à la raison telle que la loi se la représente, une volonté surveillée par la loi » (Villey, 1957, p. 94). Autrement dit, « le droit sous le nom de volonté vise une fiction de volonté, car la volonté empirique est instable et désordonnée » (Villey, 1957, p. 94).

Cette volonté corrigée rendue parfaite et stable imprègne le droit et notamment le droit civil où elle est la clé de voûte du droit des contrats. Dans ce domaine on distingue classiquement les faits juridiques des actes juridiques[4]. Pour les faits juridiques, définis comme tout événement quelconque auquel sont attachés des effets ou des conséquences juridiques, la volonté de l'individu est indifférente ; alors que pour les actes juridiques, manifestations de volonté destinées à produire des effets de droit, la volonté de l'individu a un rôle primordial, elle est une condition de leur existence ou selon les mots de J. Carbonnier (2000) « la volonté est le moteur des actes juridiques » (p. 47).

Ainsi, la réalisation d'un acte juridique exige une manifestation de volonté libre, lucide et éclairée. Il ne suffit donc pas de vouloir (volonté pure). Il est nécessaire que l'acte juridique soit le résultat d'une volonté qui est le « fruit d'une réflexion, d'une délibération éclairée par l'intelligence, [et donc] fondamentalement rationnelle » (Brenner & Lequette, 2019, paragr. 15). C'est qui explique que « la loi subordonne l'activité juridique à des conditions de capacité en considération de l›aptitude intellectuelle des individus et [qu'elle] protège les individus en situation de faiblesse contre des engagements irréfléchis » (Brenner & Lequette, 2019, paragr. 15).

De plus, pour être saisie par le droit et produire des effets juridiques, la volonté doit être extériorisée. Encore une fois, il

4 Le Code civil de 1804 ne contenait aucun article visant à différencier les faits des actes juridiques. L'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations a introduit expressément cette distinction à l'article 1100 dont le texte précise que « Les obligations naissent d'actes juridiques, de faits juridiques ou de l'autorité seule de la loi. Elles peuvent naître de l'exécution volontaire ou de la promesse d'exécution d'un devoir de conscience envers autrui ». Le Code civil équatorien contient également cette distinction à l'article 1453.

ne suffit pas de vouloir (volonté pure). Il faut que ce vouloir soit extériorisé notamment par la voie du consentement. La volonté est donc un préalable au consentement, elle est la « source du consentement » (Attuel-Mendes & Loquin, 2008, p. 67) et « une composante subjective du consentement » (François, 2007, p. 6). Le consentement devient donc l'extériorisation de la volonté de l'individu., laquelle une fois exprimée lors de la conclusion d'un acte juridique, par exemple la passation d'un contrat, demeure inchangée, stable et non soumise aux caprices de la volonté pure.

Néanmoins, même si le consentement constitue l'extériorisation de la volonté, il est possible qu'il soit différent de la volonté. C'est pourquoi la doctrine juridique différencie la volonté interne de la volonté déclarée.

La volonté interne ou réelle est un élément psychologique, et avec les progrès actuels des neurosciences, nous pouvons même dire qu'il s'agit d'un processus neurobiologique, nécessaire à la formation de l'acte juridique correspondant « à la l'intention véritable de l'auteur de l'acte » (Association Henri Capitant, 2017). Cette volonté est censée être libre, c'est-à-dire sans erreur, non extorquée par la violence ni surprise par le dol ; et rationnelle, c'est-à-dire être le fruit d'une « délibération éclairée par l'intelligence » (Brenner & Lequette, 2019, paragr. 15) et non frappée par une insanité mentale . Ainsi, la volonté interne exige un acte conscient et intentionnel, autrement dit elle « nécessite la *conscience* de ce que l'on va faire d'une part, et d'autre part *l'intention* de le réaliser » (Buffelan-Lanore & Larribau-Terneyre, 2018, p. 372).

C'est dans la volonté interne que nous reconnaissons la contribution de Emmanuel Kant au droit, puisque sa pensée a inspiré la théorie dite de l'autonomie de la volonté[5], laquelle est

5 Dans le domaine des obligations, et plus précisément dans le domaine contractuel, l'autonomie de la volonté fait du contrat, en tant que rencontre des volontés, une source du droit et donne lieu à trois principes : la liberté contractuelle (chacun est libre de contracter ou ne pas contracter, choisir son cocontractant et déterminer le contenu du contrat), la force obligatoire du contrat (le contrat est loi pour les parties et elles sont tenues de respecter leurs engagements) et l'effet relatif du contrat (le contrat n'oblige que les parties ayant contracté).

érigée sur la liberté individuelle. Ainsi, la volonté humaine se donne à elle-même sa propre loi et est « la source et la mesure des droits subjectifs ; organe créateur du droit » (Ranouil, 1980, p. 9). C'est pourquoi « la liberté de l'individu ne peut être restreinte que par sa propre volonté » (Buffelan-Lanore & Larribau-Terneyre, 2018, p. 282) et « si l'homme est obligé par un acte juridique, spécialement par un contrat, c'est parce qu'il l'a voulu » (Carbonnier, 1956, p. 53).

Comme le précisent Terré, Simler, Lequette & Chénédé (2018) en faisant de la volonté la source des obligations, l'assujettissement des individus les uns aux autres a pu être justifié lors du XIXe siècle et se maintenir jusqu'à nos jours :

> Poser que l'homme est obligé uniquement parce qu'il l'a voulu et dans la mesure où il l'a voulu, c'est encore respecter sa liberté. De là, deux propositions : un individu ne saurait être assujetti à des obligations qu'il n'a pas voulues, car il se pourrait qu'elles soient tyranniques ; un individu doit respecter toutes les obligations auxquelles il a librement consenti. (p. 33).

La complexité pour appréhender la volonté interne, en tant qu'élément psychologique, a fait que le droit se tourne plutôt vers la volonté déclarée correspondant à « la volonté exprimée par déclaration écrite ou orale ou même par gestes » (Association Henri Capitant, 2017).

En effet, le principe de sécurité juridique exige une certaine stabilité dans les relations juridiques qui ne peuvent être subordonnées au seul vouloir de l'individu. Comme le remarquait Léon Duguit (1911), à propos de la possibilité admise par le Code civil de prouver la volonté réelle pour déterminer les effets d'un acte juridique dans le cas où la volonté réelle ne correspondrait pas à la volonté déclarée :

> Ce système paraît, au premier abord, très logique, très équitable. Mais en y réfléchissant, on s'aperçoit qu'il présente de graves inconvénients et qu'il n'est point aussi logique qu'il le paraît à un observateur superficiel.

> En effet, il ouvre une source inépuisable de procès ; il favorise l'arbitraire du juge ; il peut faire disparaître la confiance qui doit exister dans les relations juridiques, il favorise le plaideur de mauvaise foi, lui permettant d'invoquer des restrictions mentales (p. 221).

Néanmoins, au-delà de cette dualité, volonté interne et volonté déclarée, le droit n'a pas retenu la seule volonté déclarée. En effet, même si dans un souci de sécurité juridique, la plupart du temps la volonté déclarée est retenue, la volonté interne peut l'emporter à condition de prouver leur discordance car :

> On ne saurait retenir une déclaration de volonté que ne sous-tend pas une volonté véritable. Il en résulte alors un décalage entre les volontés des deux parties qui fait obstacle à la rencontre de celles-ci et entraîne la nullité du contrat (Terré, Simler, Lequette & Chénédé, 2018, p. 184-185).

Par conséquent, la volonté interne est si importante que la doctrine juridique a essayé d'étudier sa formation et a même développé une théorie qui explique les éléments ou situations faisant obstacle à un consentement de qualité, autrement dit à l'extériorisation d'une volonté réelle ; il s'agit de la théorie des vices du consentement.

Ainsi, malgré ses critiques, Duguit ne nie pas l'importance de la volonté interne comme élément nécessaire à l'acte juridique. C'est d'autant plus vrai que selon Attuel-Mendes (2008), Duguit a été le premier juriste à exposer les différentes étapes du processus de la déclaration de volonté, il identifie alors quatre étapes : la conception, la délibération, la décision et l'exécution (p. 63).

D'autres juristes, tels que Michel Storck et Jean Maury, distingueraient trois phases : la connaissance, l'intention et enfin l'acte de volition. Ainsi, la connaissance serait le préalable à l'intention, celle-ci correspondrait à la volonté déterminée vers un but et l'acte de volition serait l'achèvement de ce processus (Attuel-Mendes & Loquin, 2008, p. 65).

Enfin Terré, Simler, Lequette & Chénédé (2018), à propos de l'accord de volontés, dans le même sens que les auteurs précités, considèrent que chaque partie après avoir délibéré, pesé le pour et le contre, va décider à la lumière de son intelligence de s'engager ou non. On remarquera alors la délibération et la décision comme étapes qui précèderaient au consentement en tant qu'expression de la volonté de l'individu.

En ce qui concerne la théorie des vices du consentement le Code civil détermine que le consentement peut être vicié s'il a été obtenu par l'erreur, surpris par le dol ou extorqué par la violence, vices dont le caractère déterminant s'apprécie eu égard aux personnes et aux circonstances dans lesquelles le consentement a été donné. De cette manière, le droit tient compte de l'erreur, la violence ou le dol comme de situations faisant obstacle à une volonté libre et éclairée et sanctionne sont intervention selon son impact sur la conclusion du contrat, parfois même jusqu'à la nullité absolue de l'acte. Il s'agit donc de protéger l'intégrité de la volonté, une fois qu'elle a été déjà exprimée ou extériorisée par le consentement.

Par conséquent, comme nous venons de le voir, la volonté juridique n'est pas la simple volonté ou volonté pure. La volonté juridique est une fiction qui tient compte des différents éléments philosophiques, anthropologiques, psychologiques de l'individu et qui se différencie de la volonté pure en ce qu'elle est rendue parfaite, stable, corrigée, elle ne peut vouloir que ce qui est permis par la loi et elle n'est valable que si elle a été exprimée par une personne saine d'esprit et est le résultat d'une décision libre et éclairée.

Nous venons de voir également que la liberté de la personne est intrinsèquement liée à sa volonté quelle qu'en soit la forme : volonté intérieure ou volonté déclarée. Cette liberté est appréciée soit au regard de l'état de santé de la personne, si par exemple elle n'est pas atteinte d'une maladie ou d'un trouble mental faisant obstacle à son discernement ; soit au regard des circonstances dans lesquelles elle a pris sa décision et a exprimé sa volonté, c'est-à-dire si sa volonté a été induite à l'erreur, surprise par le dol ou extorquée par la violence.

De plus, nous avons vu que le droit s'intéresse au processus de formation de la volonté, puisqu'il admet la possibilité de faire prévaloir la volonté interne ou réelle sur la volonté déclarée, à condition de prouver la discordance entre elles ; et dans ce cas, la volonté interne emportera la volonté déclarée. Dans cette étude du processus de la formation de la volonté, le droit fait appel à d'autres sciences pour s'éclairer. Comme le précise Carbonnier (2000) « les juristes suivent, en général, l'analyse de la psychologie classique : conception, délibération, décision, parfois avec des raffinements » (p. 90). Toutefois, à partir du XXe siècle il est possible de se tourner vers les neurosciences, spécialement vers la neurobiologie.

Nous allons donc voir que la volonté en neurosciences peut être associée au processus de la prise de décision, dont l'étude, notamment par la neurobiologie, a identifié son substrat biologique et l'a relié effectivement au système nerveux. Dès lors, la volonté n'est pas seulement une notion philosophique et une construction juridique, elle peut être également un processus neurobiologique.

3. LA VOLONTE DANS LES NEUROSCIENCES : UN PROCESSUS NEUROBIOLOGIQUE

Les neurosciences « rassemblent les disciplines scientifiques dont la recherche a pour objet la connaissance du système nerveux et de son fonctionnement » (Clarac & Ternaux, 2008). Elles essaient d'apporter une réponse sur le substrat biologique des processus mentaux c'est-à-dire sur la façon dans laquelle le système nerveux produit ces processus d'un point de vue neurobiologique (Kandel, Schwartz & Jessell, 2000). Autrement dit, elles cherchent à déterminer comment le système nerveux produit les émotions, la cognition, les perceptions, la conscience, les décisions entre autres processus ; et quels organes et zones sont impliqués.

Depuis longtemps, le cerveau est l'objet de la curiosité non seulement des médecins mais aussi des philosophes, des psychologues, des économistes et des neuroscientifiques. En fait, les neurosciences ont intégré ce double héritage, c'est-

à-dire, d'une part, l'héritage biomédical avec la physiologie, l'anatomie, la neurochirurgie, la neurologie ; et d'autre part, l'héritage psychologique avec la psychologie expérimentale, le cognitivisme, le behaviorisme, l'économie et la philosophie. Ainsi, expliquer la pensée, les comportements et plus largement l'esprit de l'être humain a signifié un véritable défi dont les résultats ont été obtenus au fur et à mesure des progrès technologiques.

L'essor des neurosciences, à partir de la fin du XX^e^ siècle avec le développement de l'imagerie cérébrale fonctionnelle, a permis d'approfondir les connaissances sur le système nerveux et son fonctionnement de telle sorte qu'à l'heure actuelle nous pouvons même nous en servir à des fins autres que médicales, par exemple dans le cadre du dénommé neuro-marketing où l'utilisation de l'imagerie cérébrale a permis d'observer en temps réel l'activité du cerveau et d'expliquer certains comportements des consommateurs, voire même l'écart entre leurs intentions et leurs comportements (Petit, Merunka et Oullier, 2014, p.10).

Ainsi, les neurosciences font irruption dans des attributs essentiels de la personnalité et de l'identité de l'être humain, telles que la capacité, la volonté ou encore l'autonomie, autrefois considérées insaisissables et relevant de l'âme ou plus largement de ce que Descartes appelé la *res cogitans* (chose pensante) par opposition à la *res extensa* (le corps ou chose non pensante). Ce dualisme instaurant une séparation catégorique entre le corps et l'esprit, entre la matière par nature mécanique et limitée et l'essence insaisissable, dépourvue de limites, non dépendante de la matière pour être et dont la seule nature est de penser, a largement intéressé les neurosciences et a avivé de nombreux débats.

Toutefois, les travaux d'Antonio Damasio, même s'ils n'ont pas mis fin à ces débats, ont largement contribué à démontrer que des phénomènes mentaux ou de l'esprit peuvent être expliqués à partir du corps, du fonctionnement d'un ou de plusieurs organes (par exemple le cerveau), de cellules (telles que les neurones) ou de substances chimiques (par exemple

un neurotransmetteur) avec l'aide des neurosciences (neuro-anatomie, neurobiologie, neurophysiologie, neurochimie, etc.), ce qui indique qu'il n'existe pas de séparation –du moins catégorique– entre la *res cogitans* et la *res extensa*. Pourtant, Damasio a pris soin de bien préciser que cela ne veut pas dire que l'esprit puisse être réduit à des éléments biologiques. Sans nul doute certains phénomènes de l'esprit, comme le raisonnement ou la prise de décisions, peuvent avoir un substrat biologique bien identifié, mais ils ne se limitent pas uniquement à leur biologie, l'environnement social et familial exercent bien entendu une influence sur eux, ce qui prouve également la complexité de saisir –ou du moins d'essayer de comprendre– les phénomènes mentaux et plus largement l'esprit de l'être humain.

Ayant apporté cette nécessaire précision nous allons voir que les neurosciences ne donnent pas de définition particulière du terme volonté. La volonté semble être quelque chose d'abstrait, dépourvue, pour l'instant, d'un substrat biologique spécifiquement identifié. Toutefois, l'étude de la prise de décisions semble être le pont unissant les neurosciences à la volonté et notamment à la volonté juridique, puisque comme nous l'avons précédemment vu, les juristes s'intéressent au processus de formation de la volonté soit dans le cadre de la formation des actes juridiques pour déterminer leur validité, soit dans le cadre de leur interprétation en cherchant à retrouver la volonté réelle des parties.

Ainsi, pour les neurosciences la prise de décision constitue « un processus fondamentalement intégratif correspondant à l'association de processus cognitifs complexes (encodage, maintien et récupération de l'information) avec des processus motivationnels déterminant la valeur des actions ou des séquences d'actions » (Alcaraz, 2015, p. 21). Le processus de prise de décision implique de « choisir une action (non verbale), ou un mot, ou une phrase (ou une combinaison de ces trois types d'entités) au sein de la gamme de nombreuses autres possibilités, envisageables à un moment donné, en rapport avec une situation donnée » (Damasio, 1994, p. 229).

L'étude de la prise de décisions implique donc d'étudier « l'ensemble des processus cognitifs nous permettant de choisir une option ou une action à faire parmi des alternatives s'offrant à nous accidentellement, par concours de circonstances ou intentionnellement » (Masmoudi & Naceur, 2010, p. 64).

L'étude la prise de décision a débuté en 1989 grâce à William Newsome et Anthony Movshon qui sont les premiers à avoir réussir à établir une corrélation entre l'activité électrophysiologique d'un neurone et une décision, bien que –il faut le dire tout de même– leur but n'était pas du tout cela, mais d'étudier le rôle des neurones de l'aire médio-temporale du cortex du singe dans la discrimination visuelle. Cette corrélation nommée appariement psychométrique-neurométrique, aux dires de Boraud (2015), « va devenir la cheville ouvrière de toutes études de la neurobiologie [sic] de la décision » (p.31). Ainsi, le modèle de Newsome et Movshon continuera à être la base des études postérieures qui apporteront beaucoup plus de réponses sur le processus de la décision grâce au développement de l'IRM fonctionnel.

De nos jours nous savons que le processus de la prise de décision a un substrat biologique situé dans le système nerveux, qu'il n'y a pas de décision sans émotions et que l'environnement, le niveau de certitude ou d'incertitude, la sensation de récompense ou de punition, ainsi que les automatismes mentaux peuvent guider et influer nos choix.

Dans son ouvrage *L'erreur de Descartes*, Damasio (1994) a mis en exergue le rôle des émotions dans le processus de la prise de décisions et a contribué à l'identification des zones du cerveau qui y interviennent, notamment le cortex préfrontral ventromédian. Il a ainsi démontré que les mécanismes neuraux sous-tendant la faculté de raisonnement, c'est-à-dire les processus de pensée orientés vers un but et dont la finalité est d'amener à une prise de décision, fonctionnent et sont situés non seulement dans le néo-cortex mais également au niveau subcortical :

> La nature semble avoir construit les mécanismes sous-tendant la faculté de raisonnement non pas seulement au-dessus des mécanismes neuraux sous-tendant la régulation biologique mais aussi à partir d'eux et *avec* eux. Les mécanismes sous-tendant les comportements de niveau plus élevé que les pulsions et les instincts reposent, je pense, à la fois sur les étages supérieurs et inférieurs : le néo-cortex fonctionne de pair avec les parties anciennes du cerveau, et la faculté de raisonnement résulte de leur activité concertée (p.181).

La prise de décision est donc fortement influencée par la perception des émotions qui ne sont pas « des entités aussi impalpables et éthérées que beaucoup le disent. En réalité, elles ont une existence bien concrète, et on peut les rapporter à des systèmes spécifiques dans le corps et dans le cerveau » (Damasio, 1994, p. 227). Ainsi, les émotions perçues par le corps et traduites en marqueurs somatiques acquis par l'apprentissage par l'expérience individuelle jouent un rôle d'incitation ou de prévention dans le choix à faire selon le stimuli lui étant associé. Il s'agit donc d'un « système qui [...] donne, en quelque sorte, des indications d'orientation » (Damasio, 1994, p. 241).

D'après Allain (2013) les travaux de Damasio ont permis de « pointer que les conduites complexes du quotidien, en particulier les prises de décision, n'étaient pas uniquement sous dépendance de mécanismes cognitifs mais dépendaient aussi de facteurs émotionnels exerçant parfois une pression déterminante sur l'orientation des choix » (p.73).

D'un autre côté, l'étude menée par Alcaraz et al. (2015) a mis en exergue le rôle majeur du cortex, du thalamus et des ganglions de base dans le processus de prise de décisions. Il a ainsi montré le rôle du thalamus submédian dans les comportements adaptatifs dont l'interaction avec le cortex préfrontal résulte primordial dans la prise de décision adaptée à l'environnement.

Une autre étude de neurobiologie très intéressante pour notre analyse est celle réalisée par Boraud (2015)

concernant la neurobiologie de la décision et de sa rationalité. Boraud a démontré que la prise de décision a bien un substrat neurobiologique et a répondu clairement à la question de la façon dont le tissu nerveux décide : le cortex permet d'automatiser certains processus, le circuit cingulaire qui construit une représentation mentale de l'environnement, le circuit orbitofrontal qui projette le sujet dans la représentation et évalue les options et le circuit préfrontal qui évalue les options et choisit ; la dopamine liée à l'apprentissage par renforcement et aux circuits de la récompense, le thalamus, les ganglions de la base, etc.

De plus, concernant la neurobiologie de la rationalité, Boraud (2015) a conclu que s'il y a eu une évolution au niveau du cortex rendant possible le développement de grandes capacités d'abstractions, « le processus conserve sa nature aléatoire, ce qui limite la capacité de l'homo sapiens à raisonner de façon rationnelle » (s.p.). Les limites de la rationalité sont donc intrinsèques aux propriétés du système nerveux et nécessaires au processus de la prise de décision. Boraud précise enfin que malgré l'existence d'automatismes mentaux qui découlent du développement du cortex, la partie aléatoire du processus de la prise de décision demeure.

Par ailleurs, Ernst et Paulus (2005) ont identifié trois étapes dans le processus de prise de décision : tout d'abord, l'évaluation et la formation des préférences parmi les options possibles. Ensuite, la sélection et l'exécution de l'action qui permettraient la mise en œuvre de l'une des possibilités envisagées à l'étape précédente. Enfin, l'attribution d'une valeur au résultat en fonction de l'expérience vécue et de son évaluation (satisfaction, regret, etc.)[6]. Chacune de ces étapes impliquent l'interaction de différentes zones du système nerveux central, ce qui montre que le processus mental de la prise de décisions a donc un substrat biologique identifié.

6 Tout au long de leur étude, les auteurs précisent pour chaque étape les zones du cerveau intervenant dans le processus de la prise de décisions et leur rôle, ainsi, par exemple, le cortex cingulaire antérieur agit sur le contrôle des erreurs, l'amygdale et le cortex préfrontal sont impliqués dans la motivation à l'action, la région limbique est impliquée dans le traitement émotionnel du stimuli, entre autres.

Il est clair qu'il existe une bibliographie vaste sur le processus neurobiologique de la décision, cependant les exemples que nous avons empruntés illustrent notre propos, c'est-à-dire qu'ils démontrent que si la volonté continue à être insaisissable, immatérielle, le processus de la prise de décision nous en rapproche et qu'il est dès lors possible de connaître comment le système nerveux produit une décision ainsi que les facteurs qui peuvent intervenir et influer sur un choix.

Par conséquent, l'expression de la volonté par un choix, par la prise d'une décision a bien un substrat biologique où interviennent un grand nombre de facteurs biologiques mais également de facteurs liés à l'environnement, à l'expérience individuelle, à ce que l'individu a vécu. Cela prouve également que même si la philosophie a marqué la démarche de la théorisation de la volonté caractérisée par l'autonomie, la liberté et la rationalité, les neurosciences ont tracé leur chemin pour essayer d'expliquer les phénomènes mentaux —autrefois considérés détachés du corps et ne concernant que l'esprit— dans un but médical, notamment au regard des addictions, de la schizophrénie ou des troubles obsessionnels compulsifs ; ainsi que dans un but non médical, comme c'est le cas du neuro-marketing visant à étudier « les processus mentaux explicites et implicites des comportements du consommateur (dans divers contextes marketing) qui s'appuie pleinement sur les paradigmes et les connaissances des neurosciences » (Roullet & Droulers, 2010, p. X).

Ces études, qui naissent notamment de la synergie entre les neurosciences et l'économie —synergie qui a d'ailleurs donné lieu à une discipline appelée neuro-économie—, ont démontré qu'il est possible de mieux connaître le comportement des individus, et plus spécifiquement de l'individu en tant que consommateur, ses préférences et ses motivations et ainsi mieux cibler la clientèle et la consommation pour inciter à une décision d'achat.

Pour donner un exemple, Petit, Merunka et Oullier (2014) présentent une étude selon laquelle les messages subliminaux, traités par le striatum, peuvent orienter le choix

de l'individu sans qu'il en ait conscience ; et une autre selon laquelle le désir d'obtenir un produit accroit dès lors qu'on se met à la place de quelqu'un désirant l'obtenir, montrant une augmentation de l'activité des neurones miroirs (p. 15).

Deppe, Schwindt, Kugel, Plassmann et Kenning (2004) ont mené une expérience visant à étudier comment les décisions économiques sont influencées par les contributions implicites de la mémoire. En utilisant l'IRM, ils ont monitoré l'activité cérébrale des participants qui devaient faire un choix entre deux marques d'un même produit (de la bière pour les hommes et du café pour les femmes). Une fois les produits présentés, les participants devaient choisir le produit de leur préférence en répétant le nom de la marque choisie uniquement dans leur tête. L'étude arrive à deux conclusions : d'un côté, les informations stockées dans le cerveau permettant de reconnaître une marque activent le cortex préfrontal ventromédian ce qui suggère l'intervention des émotions et faciliterait le choix à faire :

> Pour les produits se distinguant principalement par les informations sur la marque, [il y a] un effet gagnant-gagnant non linéaire pour la marque préférée d'un participant, caractérisé d'une part par une activation réduite dans les zones du cerveau associée à la mémoire de travail et au raisonnement et, d'autre part, une activation accrue dans les domaines impliqués dans le traitement des émotions et des réflexions sur soi lors de la prise de décision[7] (Deppe, Schwindt, Kugel, Plassmann et Kenning, 2005, p. 171).

Et d'un autre côté, à partir de l'hypothèse des marques somatiques et des émotions influant le processus de décision de Damasio, les auteurs concluent que la marque connue par l'individu constitue un stimuli évoquant un état somatique favorable au choix de cette marque :

> Sur la base de l'hypothèse du marqueur somatique, un FCB [first choice brand] peut être considéré comme un stimulus, évoquant un état somatique qui « force

7 C'est nous qui traduisons.

> l'attention sur le résultat négatif de la décision » et rejette immédiatement la ligne de conduite négative, c'est-à-dire de ne pas choisir le FCB, ou, si le marqueur est positif, il devient une « balise d'incitation » pour sélectionner le FCB. Pour notre sélection de la marque particulière, le contenu implicite de la mémoire et les émotions ressenties sont causales, généralement stockées longtemps avant la réelle décision[8] (Deppe, Schwindt, Kugel, Plassmann et Kenning, 2005, p. 181).

C'est pourquoi nous allons voir que cet approfondissement des connaissances touchant des attributs essentiels de l'individu peut avoir des impacts sur le droit civil où la volonté est la clé de voûte des actes juridiques et notamment du droit des contrats.

4. EXISTE-T-IL DONC UN IMPACT DES RECHERCHES EN NEUROSCIENCES SUR LE DROIT CIVIL ?

Les règles de droit dans certaines situations tiennent compte des éléments biologiques de l'individu. En droit civil ce rapport est tout à fait évident, par exemple l'institution de la filiation où l'expertise sanguine et maintenant celle concernant les empreintes génétiques servent à établir un lien de filiation ou comme nous l'avons vu auparavant, dans le cas de la capacité juridique où l'état de santé mentale de l'individu détermine la perte ou la limitation de cette capacité.

Comme nous l'avons vu, grâce aux progrès en neurosciences, il est dès lors possible de savoir comment le système nerveux produit une décision et les facteurs qui peuvent l'influencer. De ce fait, on pourrait bien se poser la question de l'autonomie de la volonté de l'individu face à un processus de prise de décision dans lequel des éléments extérieurs ou intérieurs pourraient exercer une influence.

Nous avons vu que la volonté juridique extériorisée par le consentement exige une certaine autonomie, liberté et raison de l'individu. Ce qui implique « que l'homme ne puisse être

8 C'est nous qui traduisons.

commandé pour aucune autre volonté que la sienne » (Ghestin, Loiseau & Serinet, 2013, p. 19) et même lorsqu'il s'agit de contrats d'adhésion où l'autonomie et la liberté sont présentes, car l'individu a et doit avoir la faculté de choisir d'adhérer ou non, que son consentement soit le résultat d'une délibération éclairée par l'intelligence, c'est-à-dire avec conscience et intention dans l'acte et qu'il provienne d'une personne saine d'esprit, c'est-à-dire non atteinte d'une maladie mentale.

De plus, selon la théorie de l'autonomie de la volonté, à chaque fois que l'individu a consenti à un contrat sa volonté est réputée libre et autonome, sauf preuve du contraire, ce qui veut dire qu'il y a une présomption de l'existence d'une volonté libre et autonome exprimant les souhaits des parties et saisie par le droit à travers le consentement. Le contrat est donc le résultat de l'application du principe de la liberté contractuelle, puisque les parties ont décidé de contracter mais également du contenu du contrat, dans les limites imposées par la loi, et ont choisi leur cocontractant. Il acquiert alors une force obligatoire et devient loi pour les parties qui l'ont souscrit.

Cependant, si nous connaissons comment le processus de décision fonctionne, ne serait-il pas possible de « guider », d'orienter cette décision ? Et, dans ce cas, dans quelle mesure la volonté de l'individu est-elle libre, autonome ? Dans quelle mesure serait-elle éclairée si elle ne répond qu'à une incitation déclenchée à partir des données biologiques qui provoquent une réaction pouvant orienter le choix ? Pourrions-nous dire que le consentement donné à ce contrat reflète réellement la volonté de l'individu ?

Ces questions pourraient nous amener à réexaminer le rôle de la volonté dans les contrats qui sont eux-mêmes définis depuis longtemps comme la rencontre de volontés et le lieu privilégié de la manifestation de la théorie de l'autonomie de la volonté. Cependant, s'il était possible d'orienter la décision par l'activation de certains mécanismes neurobiologiques, et que cette décision était extériorisée par le consentement de l'individu à un acte juridique, on ne pourrait pas dire que la volonté de l'individu n'existait pas, puisqu'elle existe bel et

bien et a même pu s'extérioriser. On ne pourrait pas dire non plus que la volonté exprimée ne correspond pas à ses souhaits, car on a de fait favorisé le déclenchement de ces souhaits par exemple à travers certains stimulus sensoriels.

Dans ce sens, il semblerait que la théorie de l'objectivation du contrat, minimisant le rôle de la volonté dans les contrats, émerge. En effet, selon le mouvement doctrinal qui promeut cette théorie, le contrat consiste plutôt en un échange équilibré de droits et d'obligations qu'en une rencontre de volontés. Ainsi, la volonté ne jouerait qu'un rôle secondaire et il faudrait examiner dans le contrat l'équilibre des prestations entre les parties, autrement dit « la vision objective du contrat s'intéresse davantage à la réalisation et à la justesse de cet échange qu'aux volontés qui lui ont donné naissance » (Ouerdane, 2002, p. 18). Le contrat devient donc « une opération économique fondée sur l'équilibre objectif ou subjectif des valeurs échangées » (Poughon, 1987, p.154). Cette théorie fait bien sûr l'objet de critiques telles que la difficulté à évaluer les valeurs échangées afin d'apprécier l'équilibre objectif, cependant il n'est pas question de les aborder maintenant.

De plus, le droit considère traditionnellement qu'il y a un défaut de loyauté du cocontractant dès lors qu'il a obtenu le consentement de l'autre partie ayant recours à l'erreur, le dol ou la violence, ce qui entraine l'altération du consentement et donc la nullité de l'acte. Néanmoins, si la décision a été orientée mais sans avoir recours à ces vices, il est pertinent de se demander si les vices du consentement seront dépassés et s'ils devront faire l'objet d'une adéquation en fonction des progrès des neurosciences et notamment des connaissances neurobiologiques sur le processus de prise de décisions.

Il a d'ores et déjà été constaté une inadaptation des vices du consentement prévus par le Code civil aux situations contractuelles actuelles. Comme l'explique Ouerdane (2002), dans un contexte où les types de contrats se multiplient et, de ce fait, deviennent plus complexes, et que les techniques de vente approfondissent la disparité entre les cocontractants touchant

notamment les plus faibles, les vices du consentement de 1804[9] ne sont plus adaptés au contexte contemporain.

En effet, la complexité pour prouver le dol ou la violence ainsi que leur conception très limitée dans les textes ne permettent pas de protéger l'intégrité du consentement dans toutes les circonstances où la volonté serait atteinte. Ainsi, pour retenir le dol il faut prouver l'utilisation de manœuvres trompeuses, ce qui implique nécessairement l'intention du cocontractant de tromper l'autre partie afin d'obtenir son consentement. Or, toutes les manœuvres ne sont pas comprises par le dol, il faut qu'elles soient illégitimes et donc le bonus dolus « qu'à toujours toléré la morale des affaires, ces menus mensonges dont se sert le marchand pour vanter sa marchandise » (Carbonnier, 2000, p. 101) est exclu.

Concernant la violence, c'est-à-dire le fait de s'engager sous la pression d'une contrainte inspirant la crainte d'exposer sa personne, sa fortune ou celle de ses proches à un mal considérable, il faut prouver l'existence d'une contrainte ou d'une menace qui a créé un sentiment de crainte dans le cocontractant. Or, toutes les menaces ne sont pas illégitimes et dans certaines situations il peut y avoir une forte pression qui, sans inspirer la crainte, donne au cocontractant l'impression de ne pas avoir d'autre choix que de consentir, par exemple « dans le cas de ventes agressives, le cocontractant peut consentir à un achat qu'il regrettera peu de temps après, sans avoir agi sous l'empire d'un sentiment de crainte, mais plutôt de surprise, d'harcèlement ou de lassitude » (Ouerdane, 2002, p. 148).

Il y a donc bien lieu à étudier une possible adaptation des vices du consentement aux progrès des neurosciences, puisque l'on pourrait orienter une décision par l'activation de ses mécanismes neurobiologiques sous-jacents et en fonction de l'interférence exercée la volonté de l'individu sera soit préservée, soit atteinte, ce qui nous amène à admettre des degrés d'intensité de l'interférence qui devront être qualifiés de licites ou d'illicites sachant que nous vivons dans un contexte

9 Le 21 mars 1804 (30 ventôse an XII pour le calendrier révolutionnaire français) a été promulgué le Code civil des français, aussi connu sous le nom de Code Napoléon.

d'hétéronomie où l'autonomie totale n'existe pas et que le monde des affaires et les techniques de vente deviennent de plus en plus complexes et intrusifs.

Cela dit, il convient de se demander à partir de quel degré cette interférence deviendrait illicite de telle sorte qu'elle puisse vicier le consentement et comment déterminer l'intensité de cette interférence. Si l'on suit le raisonnement de Sunstein (2003), il n'y aurait rien d'illégitime à condition que tous les choix soient présentés, car il ne s'agit que d'un coup de pouce à une possibilité déjà envisagée par l'individu parmi plusieurs et que le processus neurobiologique de la décision conserve une partie d'aléatoire, ce qui permet de garantir la liberté de l'individu ainsi que son autonomie.

En outre, comme nous l'avons déjà dit, à l'heure actuelle, le droit positif attribue des effets juridiques à la volonté interne dans certaines circonstances. Ainsi, si l'on peut prouver qu'il existe une discordance entre la volonté interne ou réelle et la volonté déclarée, la volonté réelle prime. En ce sens, quelle serait la volonté interne à l'époque des neurosciences ? Parlera-t-on de volonté réelle comme synonyme de volonté biologique ? Et dans ce cas, devrons-nous éliminer toute subjectivité du consentement (volonté interne) et ne nous attacher qu'aux éléments objectifs du consentement, c'est-à-dire au simple équilibre de prestations, à leur réalisation et à leur justesse ?

CONCLUSIONS

La volonté a fait l'objet d'un grand nombre d'études dans plusieurs champs des sciences telles que la philosophie, les neurosciences ou le droit. Dans ce cheminement, l'explication de ce qu'est la volonté et en quoi elle consiste rencontre une explication plus vaste et abstraite dans la philosophie ; chez les juristes elle fait l'objet d'une adaptation par la voie de la technique de la fiction de manière à ce qu'elle puisse être saisie par le droit et garantir une certaine sécurité juridique dans les relations entre les individus. Enfin, pour les neurosciences, elle est saisie dans l'une de ses manifestations : la décision. Par l'étude du processus de la prise de décisions la volonté devient

plus tangible dès lors qu'elle trouve une explication dans un processus neurobiologique avec un substrat biologique identifié. Ainsi, l'étude de la volonté montre combien il est complexe d'expliquer les phénomènes mentaux, les produits de l'esprit de l'être humain, lesquels ne peuvent être expliqués sous un regard unique, sous peine de tomber dans un réductionnisme.

Que ce soit dans la philosophie, le droit ou les neurosciences, la volonté est caractérisée par l'autonomie et la liberté. La volonté est autonome dès lors que l'individu édicte sa propre décision guidé par la raison et elle est libre lorsqu'il n'y a aucune interférence dans le processus de décision ni aucune détermination et que l'individu peut donc choisir de son plein gré.

De plus, l'autonomie et la liberté sont caractérisées par la raison, laquelle dans une décision saisie par le droit se traduit par la délibération sur l'acte avant son exécution, c'est-à-dire par l'entendement, l'intelligence, la conscience et l'intention de l'individu de réaliser ou non un acte ; ou saisie par les neurosciences lorsqu'il s'agit de la meilleure décision dans le rapport coût-bénéfice, c'est-à-dire la raison saisie par les économistes et qui comme le voyons a été empruntée par les neurosciences. Néanmoins, l'on voit bien qu'il n'y a pas de volonté autonome (raison = autonomie) dans la mesure où nos décisions ne sont pas toujours rationnelles, comme cela a été démontré tant par les neurosciences, que par l'économie et la psychologie, mais guidées par nos passions et nos émotions sans qu'elles soient nécessairement le meilleur choix dans le rapport coût-bénéfice.

Nous rappellerons toutefois que bien que les progrès des neurosciences ont montré que certains phénomènes mentaux ont un substrat biologique, et plus précisément neurobiologique, qui explique en partie leur réalisation, il n'est pas possible de réduire l'être humain à ce qu'il y a dans son cerveau sous peine de tomber dans un neuro-essentialisme et dans le déterminisme biologique, ou plutôt neurobiologique, qui inclurait par exemple la négation du libre arbitre dans le cas qui nous occupe. Il est clair que l'individu du modèle expérimental,

limitation propre aux sciences expérimentales telles que les neurosciences, n'est pas celui de la vie réelle où son expérience et son environnement ont un rôle à jouer dans la construction de son être et dans la prise de ses décisions.

Bien que les neurosciences aient démontré qu'il existe un déterminisme biologique dans certains mécanismes de la décision, cela ne veut pourtant pas dire que l'ensemble des décisions et des actions de l'individu soient le fruit de ce déterminisme biologique, qui répond de fait à une nécessité d'adaptation et de survie de l'être humain, et ainsi qu'il a également été démontré, le processus neurobiologique de la décision conserve une grande partie d'aléatoire qui ne peut être uniquement expliquée par les neurosciences. Dans une décision, il y a bien sûr des éléments neurobiologiques qui interviennent mais également des éléments liés à l'environnement et aux circonstances particulières dans lesquelles elle doit émerger. C'est précisément à l'ensemble de ces éléments que le droit, et notamment dans notre étude, le droit civil, va s'intéresser dans les rapports juridiques de l'individu dérivés de ses décisions, fruit de sa volonté et exprimée par le consentement aux actes juridiques.

En outre, la volonté juridique en tant que fiction construite par le droit tient compte de la volonté interne ou réelle impliquant les notions de conscience et d'intention ainsi que de la volonté déclarée qui prend la forme du consentement. Bien que de nos jours cette volonté soit protégée soit par la possibilité de démontrer la discordance entre volonté interne et volonté déclarée, soit *a posteriori* à travers l'application des vices du consentement, on ne peut cesser de se demander quelle sera la volonté à l'époque des neurosciences au regard notamment de l'autonomie de l'individu.

Dès l'Antiquité, autonomie, liberté et raison sont mises en exergue pour expliquer l'esprit et le comportement de l'être humain. Toutefois, il semblerait que cette autonomie et même cette liberté pourraient être mise à mal du fait des connaissances sur le fonctionnement biologique du processus de la prise de décisions, puisque comme nous l'avons vu il

serait possible d'orienter les décisions de l'individu par des interférences externes comme la publicité, les images, les odeurs, bref une série de stimulus sensoriels, ou au contraire par des interférences provenant de lui-même, de mécanismes innés nécessaires à sa survie tels que la réaction émotionnelle à certains traits comme la taille ou certains types de mouvements perçus par l'individu. Ainsi, sous l'apparence d'une autonomie de décider par soi-même et d'une liberté d'agir pourrait se cacher une série d'incitations ou de contraintes créées pour guider nos choix, et donc nos décisions. Ces décisions pourront ensuite prendre la forme d'actes juridiques, et plus spécifiquement de contrats. Dans ce cas, le rôle de la volonté juridique, cœur des actes juridiques, devrait être réétudié afin d'être adapté aux nouvelles circonstances et au développement des connaissances en neurosciences. Il est donc clair qu'un dialogue interdisciplinaire s'impose.

Bien que les faits précèdent le droit et donc la règle juridique, il est tout de même important que le droit puisse porter un regard critique sur cette nouvelle époque, l'époque des neurosciences, qui rappelle la course pour le décodage du génome humain, car les progrès des neurosciences pourraient bouleverser le droit, notre droit, imprégné du volontarisme, de la volonté libre et éclairée de l'individu, des actes juridiques dont la clé de voûte est la volonté.

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Monica Vinueza Flores : Titulaire d'un Master Droit de la Santé délivré par l'université de Bordeaux. Doctorante du Centre européen de recherches en droit des familles, des assurances, des personnes et de la santé de l'université de Bordeaux (France).
Courrier électronique: monica.vinueza-flores@u-bordeaux.fr
Ville: Quito
Pays: Ecuador

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Designations of origin and geographical indications as an element of economic development: The Ecuador Case

Denominaciones de Origen e indicaciones geográficas como elemento de desarrollo económico: El Caso Ecuador

Jorge Núñez Grijalva
Doctor of Legal Sciences, Universidad Católica Argentina.
Professor in Pontificia Universidad Católica del Ecuador Sede Ambato.

Daniela Núñez Viera
Lawyer, Pontificia Universidad Católica del Ecuador
Master of Arts in International Trade, Universitá degli Studi di Palermo.

Dayana Madrid Villacís
Lawyer, Pontificia Universidad Católica del Ecuador.

City: Ambato
Country: Ecuador

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ABSTRACT: The denominations of origin and geographical indications, as distinctive signs, occupy a prominent place as an element of the impulse to the economic development of a given territory, since through them the development and marketing of high-quality products and differentiation, which in turn, allows reaching significant levels of commercial and tourist positioning for the place or region of its origin, as well as the generation of new sources of direct and indirect employment, increasing foreign exchange income from exports, the increase of State tax collection, among other socio-economic benefits. Thus, designations of origin and geographical indications are considered elements of economic development within the productive policy of a State. Therefore, the purpose of this work is to analyze the denominations of origin and

geographical indications as a specialized category within the field of Trademark Law and Intellectual Property Law. It is relevant for a better understanding of how these concepts developed in Ecuadorian legislation. While for determining the options presented by the local legal framework promoting its development and use. Moreover, as those elements that the State should consider for taking advantage to promote national growth. Then the exegetical-critical method has been used, through is introduced a doctrinal and normative approach.

KEYWORDS: Designations of origin, geographical indications, intellectual property rights, trademarks.

RESUMEN: Las denominaciones de origen e indicaciones geográficas, en su calidad de signos distintivos, ocupan un lugar destacado como elemento de impulso al desarrollo económico de un territorio determinado, ya que por medio de los mismos se favorece la elaboración y comercialización de productos de alta calidad y diferenciación, lo que a su vez, permite alcanzar importantes niveles de posicionamiento comercial y turístico para el lugar o región de su procedencia, así como también la generación de nuevas fuentes de empleo directo e indirecto, crecientes ingresos por divisas por exportación, el incremento de la recaudación tributaria del Estado, entre otros beneficios socio-económicos. De esta forma, las denominaciones de origen y las indicaciones geográficas son consideradas elementos de desarrollo económico dentro de la política productiva de un Estado. En tal virtud, el propósito de este trabajo es analizar las denominaciones de origen e indicaciones geográficas como una categoría especializada dentro del campo del Derecho Marcario y del Derecho de la Propiedad Intelectual, con el objeto de comprender de qué manera se han desarrollado estos conceptos en la legislación ecuatoriana, a la vez de además determinar las opciones que presenta el marco jurídico vigente en el país para propiciar su desarrollo y utilización, así como también los elementos que el Estado deberá considerar para aprovechar de mejor manera estos elementos a favor del crecimiento nacional. Para hacerlo, se ha empleado el método exegético-crítico, a través del cual se realiza una aproximación doctrinaria y normativa del tema.

PALABRAS CLAVE: denominaciones de origen, indicaciones geográficas, derecho de propiedad intelectual, marcas

INTRODUCTION

Intellectual Property Law as a legal branch seeks to protect creations of human nature, characteristic of the creativity and work of each person. These creations must be worthy of a legal recognition that grants validity, trust and quality certification to others. Thus, within the Intellectual Property Law is the Industrial Property Law, which in turn contains the distinctive signs, such as brands, trade names, trade slogans, geographical indications and designations of origin. The distinctive signs, in general terms, allow to differentiate a product or service from other similar ones, as well as to identify its business, industrial or geographical origin.

In Ecuador and the countries of the Andean Community of Nations-CAN (2000), Andean Decision 486, Common Industrial Property Regime, is in force, which in its articles from 143 to 236, classifies the distinctive signs into the following:

i) Trademarks

ii) Trade names

iii) Business slogans

iv) Commercial signs or banners

v) Appellations of origin

vi) Indications of origin

vii) Well-known signs

It is necessary to mention that the regulatory regulations for distinctive signs, in all its provisions, and especially those related to registration procedures, absolute and relative prohibitions, protection, management and sanctions, make consideration of very close similarity among all the distinctive signs. However, this study will specifically address designations of origin and geographical indications.

Then, at the outset it should be noted that the appellations of origin and geographical indications are a type of distinctive sign that creates a unique qualitative link between the product or service offered, with the place or region where it has been produced or provided, respectively; In addition to the appellations of origin, the knowledge and the different skills that the inhabitants of this geographical place possess, for the elaboration of the product or the provision of the service that has been registered under this very particular brand.

For identifying the geographical origin of the products, the appellations of origin and geographical indications consist of the name of the place or region where a product has been produced and, eventually, where a service has been provided. The names of certain beverages such as Tequila, Champagne or Pisco are taken as typical examples of these specialized brands, which are recognized worldwide for their exquisiteness and particular characteristics. Thus, the European and Latin American evolution regarding this category of specialized brands shows the interest at an economic and social level that it has achieved through its application, in addition to the regulatory adaptation towards a legal framework that adequately protects the designations of origin and geographical indications present in each state.

In this way, one of the possible mechanisms of development and generation of opportunities for a country is to promote its products through designations of origin and geographical indications. For example, in Ecuador, the first designation of national origin was granted in 2008, called "Cacao de Arriba". This registration guarantees the consumer the highest possible quality, and the industrialists benefit from specific characteristics in the products they make with this cocoa (e.g. chocolates, cocoa drinks, among others). In exchange, cocoa producers obtain legal protection against the production or processing of such products in other areas.

On the other hand, current regulations in Ecuador show that both at the constitutional level and in secondary laws, if the use and application of these innovative instruments to promote development is promoted. However, in practice, both

the central and local governments need to increase their efforts to promote the knowledge, development and implementation of a more significant number of designations of origin and geographical indications in all regions of the country, which would undoubtedly constitute a high impulse (from the State) in favour of a sustainable social and economic development for the country.

1. CONCEPTUALIZATION OF GEOGRAPHICAL INDICATIONS AND DESIGNATIONS OF ORIGIN

For specialized international organizations, a geographical indication is: "(...) a sign used for products that have a specific geographical origin and whose qualities, reputation and characteristics are mainly due to their place of origin. Generally, the geographical indication consists of the name of the place of origin of the products." (WTO I, 2018, p. 1)

An excellent example of what has been said is observed in agricultural products, which have certain intrinsic qualities generated by the characteristics of the geographical place of production of the same, such as the climate (e.g. temperature of the place, level of rainfall and level of humidity, among others) and the terrain (e.g. soil type, fertility, level of erosion, among others).

On the other hand, appellations of origin are a particular type of geographical indication that allow us to identify the country, region or place of provenance of a specific product, added to a conjunction of natural factors and human factors in the production, manufacturing and processes or extraction thereof, thus obtaining specific characteristics that differentiate it from other similar products on the market. It is the primary function of a designation of origin, which facilitates the worldwide commercial positioning of the products it protects, enhancing their unique characteristics and prestige, beyond pure geographical origin.

For Latin American doctrine, the designation of origin is "a distinctive sign that refers to a locality, city, country,

region, that is, the geographical area in which a notorious product has been collected, transformed or manufactured." (Castro, 2009, p. 194) In other words, the fact that an area possesses an absolute natural, soil, climatic, geographic, and especially human characteristics, means that the products made in it are capable of having, in turn, a particular reputation or qualities not possible to be obtained by being made in a different geographical area. It fully justifies the protection of designations of origin, since they constitute an instrument of everyday utility, which provides benefits to a plurality of human groups, including producers, consumers, tourists, in addition to scientific, technological and economic development. of the territory, among others. This position of strength, capable of contributing to the growth and prestige of a country within the current globalized and competitive world, is particularly useful when planning local development in each of the national states that have these types of highly recognized international brands.

Based on the preceding, and as a doctrinal synthesis, it can be said that both geographical indications and designations of origin are trademarks of worldwide scope, representing products of high international prestige, boosting trade and transactions in protected goods under its registration. With practical effect, it should be borne in mind that the geographical indication is the most widespread species, which includes the designation of origin, the latter being a more specific and defined species than the former.

In the normative field, at the level of the Nadina Community of Nations-CAN (2000), Decision 486, in its Article 201, conceptualizes appellations of origin as follows:

> Denomination of origin shall be understood as a geographical indication constituted by the name of a country, a region or a specific place, or constituted by a name that, without being that of a country, a region or a specific place, refers to a specific geographical area, used to designate a product originating from them and whose quality, reputation or other characteristics are exclusively or mainly due to the geographical environment in which it is produced, including natural and human factors. (p. 47)

In Ecuador, the Organic Code of the Social Economy of Knowledge, Creativity and Innovation (2016), defines the appellations of origin reproducing the conceptualization above of Decision 486, which is entirely subsumed, by saying that:

> It will be understood by the denomination of origin the geographical indication constituted by the denomination of a country, a region or a certain place, or constituted by a denomination that without being that of a country, a region or a determined place refers to a determined geographical area, used to designate a product originating from them, when a certain quality, reputation or other characteristics of the product is exclusively or essentially attributable to the geographical environment in which it is produced, extracted or processed, including natural and human factors. (p. 10)

However, the national norm contributes to the legal construction of the issue, by providing below that:

> In the case of homonymous designations of origin, protection will be granted to each one. The Regulations will establish the conditions to differentiate among themselves the indications or homonymous names in question, taking into account the need to ensure that the products concerned receive equal treatment and consumers are not misled. (Ingenios Code, 2016, p. 111)

This last paragraph incorporated by the national norm is critical since it highlights the need to regulate the granting of designations of origin, ensuring the adequate legal protection of all of them within the national territory by the State, as well as ensuring the proper use thereof in favour of protected products, their producers and consumers, preventing their misuse or confusion, allowing the possible appearance of acts of unfair competition.

1.1 Brief origin and evolution of appellations of origin and geographical indications

Throughout the world there are certain regions or countries that have unique geographical characteristics and traditional ways of making some specific products, which implies their authenticity as they are generally considered to be characteristic or traditional of the area; This allows these products to occupy a special place in the preferences of consumers, which helps to create a competitive advantage regarding price and originality.

It will have to consider that in its beginning, the geographical indications and the denominations of origin were born from the widespread custom of putting certain agrarian and craft products, the same name of the geographical place of their elaboration. In this way, human settlements in specific geographic areas and the natural use of the raw materials available in these sites, led to people (farmers and artisans, at first), beginning to produce processed foods (e.g. liquor, wine, cheese, sprinkles, among others) and various products for human use (e.g. clothing), which were branded with the names of the geographical places where they lived and produced, is evident the use of these brands collectively and shared with the other inhabitants of the city, province or region, who generally also made the same products.

For Errazuriz (2010), in its evolution, "the use of geographical indications and designations of origin is the natural consequence of quality products that have a good reputation" (p. 208), a situation that has multiplied thanks to the human talent existing throughout the world, for what the indications of geographical origin (within which the designations of origin are located), "were born with the custom of designating the products with the name of the place of their production or manufacture." (Errázuriz, 2010, p. 208)

As an excellent example of a global geographical indication, we can mention the renowned Roquefort cheese, made in the town of Roquefort-sur-Soulzon, department of Aveyron, France. It happens that in the fourteenth century, King

Charles VI granted the inhabitants of the canton of Roquefort permission for the exclusive use of this name, in order to distinguish cheese made from goat's milk and matured in the caves that exist in the region. As another good example, there is the fact that later, in the same fourteenth century, France promulgated the first rules to regulate the use of geographical indications, prohibiting the name of another region from being produced in a specific region different from the one in which it had been produced, (Schiavone, 2003, p. 17) with the apparent purpose of protecting national spirits, avoiding confusion and abuse in their marketing.

Within the legal field, this evident need to regulate the use of geographical indications began with the appearance of the first protective norms for geographical indications and designations of origin. In this regard, it was not until the 19th century that the appellations of origin were established in France, constituting a certainly late regulatory development, since it came after the destruction of French vineyards by the phylloxera plague in 1870 and the shortages that followed it. (Schiavone, 2003, p. 17). It is the reason why large quantities of wines were made through fraudulent practices, through which some vineyards in the south of the country usurped famous names such as Bordeaux or Burgundy, this not being its origin. After the appearance of these first French regulatory standards to avoid chaos in the use of geographical indications, it also began to be done in other European countries, such as Spain, Italy and Portugal. (Álvarez, 2001, p. 93 -94)

About the appellations of origin, France was also a pioneer. Thus, the first designation of origin to be granted worldwide (the year 1887) was the name Champagne, granted in favour of the Union of the Grand Marquises de Champagne, to identify the exclusive ownership of this name for sparkling wines from that region. (Orozco, 2008, p. 391)

It is necessary to clarify that within the direct geographical indications, the following legal terms are used interchangeably: indication of origin, geographical indication, the designation of origin, protected designation of origin, and protected geographical indication. It is for this reason that, in the

opinion of European doctrine, there is the absence of a uniform legal concept and universal validity in this regard, which means that the question of the definition must be addressed concerning the particular legal text that has. (Botana, 1994, p. 79) Under this, this research uses the terms' denomination of origin' and 'geographical indication' in a general way, since the current legal framework in Ecuador uses the mentioned terms.

1.2 Main differences between geographical indications and designations of origin

At the discretion of the World Intellectual Property Organization-WIPO, the fundamental difference is that the link with the place of origin is closer in the case of a designation of origin.

In this way, the quality or characteristics of a product protected by a designation of origin must be exclusive or unique, as a consequence of its geographical origin. Therefore, this means that the raw materials must come from the place of origin and that the production of the product should also take place there.

On the other hand, in the case of geographical indications, a single criterion attributable to its geographical origin is sufficient, be it a quality or other characteristic of the product, or even its reputation alone. (WTO, 2018)

In order to have a different point of view, which contrasts with the previous one regarding the purported 'clear differences' between the designation of origin and geographical indication, the Institute of Industrial Property of Chile-INAPI (2018), thinks that this difference "is very subtle and not it always appears clearly", because both the geographical indication and the denomination of origin constitute industrial property rights that identify a product as originating in a specific country, region or locality, where the quality, reputation or other characteristics of the same are attributable to its geographical origin. However, the designation of origin also considers other natural and human factors that affect the characterization of the product. In this way, the appellation

of origin is a particular type of geographical indication, being included within the concept of geographical indications.

Using the positive Law, the Lisbon Agreement, relative to the Protection of Denominations of Origin and their International Registration, places the geographical indication as well as the denomination of origin in the same trademark category, when in its Art. 2, num. 1), gives them the following definition:

> Denomination of origin, within the meaning of this Agreement, is understood as the geographical denomination of a country, region or locality that serves to designate a product originating from it and whose quality or characteristics are exclusively or primarily due to the geographical environment, including natural factors and human factors. (WTO, 1979, p. 1)

In this way, and for what is exposed in the WIPO doctrine and the strict regulations in force, and considering that both geographical indications and appellations of origin share the same trademark category, in this investigation they are given standard treatment, limiting themselves only to highlight specific functional differences between them, when necessary.

1.3 Main functional uses of geographical indications and appellations of origin

Within international trade, it is relevant to cite the point of view of the World Trade Organization-WTO, as well as the Agreement on Trade-Related Aspects of Intellectual Property - TRIPS -, regarding geographical indications.

Thus, the WTO (2017) itself explains the function of a geographical indication within the commercial sphere, as follows:

> The quality, reputation or other characteristics of a product can be determined based on where they come. Geographical indications are place names (in some countries they are also words associated with a place) that are used to identify products that come

from certain places and have certain characteristics (for example, ‘Champagne’, ‘Tequila’ or ‘Roquefort’).

The geographical indication is an expression or sign used to indicate origin; that is, that a product or service has its origin in a particular country or group of countries, region or locality. About the functions of geographical indications, these are classified into qualified and straightforward geographical indications. (Larraguibel, 1995, p. 119)

a. Simple geographical indications. - They are those that refer to the physical place recognized as the centre of production or transformation of products. In this case, its function is only to indicate the place of origin, geographically referencing the product with this geographical site, without trying to link this origin with its quality or with some specific characteristics.

b. Qualified geographical indications.- These are related to the geographical names that designate a product originating from that specific territory (country, province, canton, parish), fulfilling the function of informing the public, regarding certain qualities or characteristics of the product, which could increase their fame or reputation, and that is fundamentally attributable to their geographical origin, including natural and human factors.

In this second class, according to Schiavone (2003) the appellations of origin are located, which in turn register three subclasses, namely: i) controlled appellations of origin (subject to regulation and control by the authority); ii) registered appellations of origin (subject to registration); and, iii) qualified and guaranteed designations of origin (which refer to more excellent quality and control of the product). (p. 19)

1.4 Examples of geographical indications and designations of origin

In Ecuador and other countries of the Andean Community of Nations-CAN:

a. Ecuador.- For the National Service of Intellectual Rights-SENADI (ex IEPI), the designation of origin, duly used,

constitutes a powerful tool to generate social and economic development within, through promoting its products that have the various regions or geographical areas thereof, preventing the cultural heritage and geographical advantages of the country from being lost.

Example of this loss, we have it in the case of the famous hats made from toquilla straw and known worldwide as 'Panama Hat' (Panama hat). This unique and exceptional product, given its name, is thought to be produced in Panama, when it is made in Ecuador. This situation of confusion, present for more than a century, has generated a loss in the image and positioning of the product, of its right manufacturers and of the country of origin (Ecuador), in the world market for articles to complement clothing.

Thus, to remedy in some way the loss of national identity mentioned above, by request made by the Union of Artisans of Montecristi in February 2005, the former Ecuadorian Institute of Intellectual Property-IEPI (current SENADI), dated 15 June 2009 granted the denomination of origin 'Sombrero de Montecristi' (second denomination of origin in the country), to identify the hat made from toquilla straw by the inhabitants of the Jipijapa and Montecristi cantons in the province of Manabí, which allowed IEPI's own words, "to preserve its tradition and tell the world that its unique fabric originates from Montecristi, Ecuador." (Crónica, 2014)

Regarding this product, it is worth mentioning that even before obtaining the designation of origin, it was inscribed in 2012 on the Representative List of the Intangible Cultural Heritage of Humanity, of the United Nations Educational Organization, Science and Culture -UNESCO. (UNESCO, 2012)

Apart from the Montecristi Hat, in Ecuador there are other designations of origin, among which stand out:

i) 'Cacao Arriba', the first national designation of origin, granted by the IEPI on March 24, 2008, to identify high-quality cocoa grown in the provinces of Santo Domingo de los Tsáchilas, Pichincha, Manabí, Los Ríos, Cotopaxi, Guayas, Bolívar, El Oro, Napo, and Sucumbíos. As it is known, for its quality, Ecuadorian

cocoa is the best in the world, which is why the products made with this raw material have also reached this high place; An example of this is the Pacari Chocolate brand[1], created in 2002, and which for several consecutive years has been awarded by the International Chocolate Awards, as the best chocolate in the world in various categories, currently accumulating 128 international awards conferred by various specialized events, using the blind tasting modality. (Pacari, 2018)

ii) 'Café de Galápagos', the designation of origin granted on September 29, 2015, by the IEPI, to identify coffee is grown in the Galapagos Archipelago, variety Arabá Bourbon Antiguo, 100% organic, ecological and cultivated in the volcanic mountains of the archipelago, which has unique characteristics due to its geographical conditions, among which stands out is the second archipelago with the highest volcanic activity on the planet. These conditions have given its soils "properties unlike any other part of the world, to be a place where coffee is produced in combination with the cold of the highlands and the sea breeze". (El Comercio, January 22, 2015)

b. Colombia.- In this Andean country, a member of the CAN, there is a significant example to mention on the subject in question; It is the geographical indication 'Café de Colombia', which has achieved worldwide fame and recognition. This brand is the property of the National Federation of Coffee Growers of Colombia-FNC; According to records from the World Intellectual Property Organization-WIPO, in December 2004 the FNC submitted a request to the Colombian Government to recognize Colombian Coffee as a geographical indication, and to the European Union-EU in 2005, the first time that He was submitting such an application for a product from a non-EU country.

In September 2007, the formal recognition of Colombian Coffee as a Protected Geographical Indication under the EU system was made official. (WTO, 2017) Regarding the United States, the FNC has registered the 'Juan Valdez' mark before the United States Patent and Trademarks Office-USTPO since

1 *Pacari* means 'nature' in the Quechua language, originally from the Andes of Ecuador, Peru and Bolivia.

1960, and the '100% Colombian coffee " mark since 1969. At the moment, Café de Colombia has eleven recognized protected geographical indications; Of these, which four have been granted as appellations of origin by the Superintendency of Industry and Commerce of Colombia

c. Peru - Chile. - In this case, Peru (a member of the CAN) is mentioned, along with Chile, due to the dispute between the two nations for the ownership of the designation of origin 'Pisco'. In this regard, these two countries consider this designation of origin as their own national identity, each arguing that it is the first where this distilled drink from fermented grape must have started to be produced, during the period of Spanish rule in South America.

In the case of Peru, on December 12, 1990, the ITINTEC Industrial Property Directorate declared that the PISCO designation is a designation of Peruvian origin, for products obtained by distilling wines derived from the fermentation of fresh grapes, on the coast of the departments of Lima, Ica, Arequipa, Moquegua, and the valleys of Locumba, Sama and Caplina in the department of Tacna. (Regulatory Council of the Denomination of Origin Pisco, n.d.) Later, in 2011, the Regulatory Council of the Denomination of Origin Pisco was created, through a resolution issued by the National Institute for the Defense of Competition and Intellectual Property - INDECOPI, with the purpose, to administer the Pisco Denomination of Origin and to care for and defend the quality of Pisco. (Regulatory Council of the Denomination of Origin Pisco, n.d.)

For its part, in the case of Chile, in modern times, Law 18455 of November 11, 1985, established the rules for the production, processing and marketing of ethyl alcohols, alcoholic beverages and bottles of vinegar (currently in force), which determines in its Art. 28. a), that the designation of origin pisco, "is reserved for brandy produced and packaged, in units of consumption, in Regions III and IV, made by distillation of genuine drinking wine, from the varieties of vines determined by the regulations, planted in said Regions". (Law 18455, 1985, p. 17)

Subsequently, the Regulation of the Pisco Denomination of Origin (issued by Decree 521, of May 27, 2000), defined pisco, Art. 2. b), as the "brandy produced and packaged, in consumption units, in Regions III and IV of the country, made by distillation of genuine drinking wine, from the grape varieties that are determined in this regulation, planted in said regions". (Decree 521, 2000, p. 17) It is worth mentioning that the Chilean Pisco Zone includes the Atacama and Coquimbo regions. Finally, in 2003, the Association of Producers of Pisco A.G. of Chile, as a representative of the interests of the industry and promoter of the historical, social, cultural and productive heritage value of pisco, under the umbrella of its Denomination of Origin. (Pisco Chile Asociación Gremial, n.d.)

Be that as it may, most countries in the world have accepted to recognize as a designation of origin, both pisco from Peru and from Chile, thus granting equal rights to the two nations, to exercise peaceful co-ownership of the same tacitly, a situation that, of course, benefits the two interested parties, and above all, the consumers of this unique drink around the world, who have at their disposal a broader offer to choose and delight.

1.5 Legal framework and current situation of appellations of origin and geographical indications as a tool for economic development in Ecuador

For the European Commission, geographical indications are becoming useful for developing countries due to their potential to add value and promote rural socio-economic development. (European Commission, 2013) Thus, from this perspective, geographical indications (and their specialized derivation, designations of origin), can help create new job opportunities in the area where the good is produced since higher demand requires an increase in production, which offers the possibility of benefiting from the protection not only of small groups but of the entire community. On the other hand, geographical indications can also help preserve traditional knowledge and traditional cultural expressions, which are the process, knowledge and artistic heritage developed by a community in a given region, and which have been passed down from generation to generation, which is especially crucial for

handicrafts, at the discretion of the World Intellectual Property Organization-WIPO. (WIPO, n.d.)

Thus, being clear that geographical indications and appellations of origin constitute a precious intangible asset, capable of providing various advantages for rural communities and small producers in the world, it is essential to mention that they are still underestimated in many countries such as This is the case of Ecuador, where its main export products (banana, cocoa, coffee and roses, among others) are not protected by these intellectual property instruments.

In the scope of this legal protection, at an international level, and concerning geographical indications, most industrial property rights are guided by the principle of territoriality, which establishes that the protection and exploitation of an industrial property asset only it is granted in the territory where it has been recognized, that is, it does not extend beyond the borders of the country where the right has been given. In this regard, the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, maintains that "geographical indications are territorial, therefore the principle of territoriality, which is generally associated with the protection of intellectual property rights, it also logically applies to the field of geographical indications". (WIPO, 2002, p. 2) Thus, geographical indications are protected or denied legal recognition, according to the internal laws and regulations of each country.

Now, in addition to local protection, industrial property assets deserve international protection that prevents any usurpation or imitation. In this regard, some countries have signed several international treaties for this purpose, which has been a very complicated task for the differences between legal concepts in many countries. (Palau & Pacón, 2012, p. 280) These treaties have somewhat regulated the application of designations of origin and geographical indications, to unify criteria, one of the main ones being the Lisbon Agreement, which entered into force in 1966 and is administered by the International Office of the WIPO. One of the advantages of being contracting parties to this Agreement is to ensure the

protection of the name without the need for renewal, while the name is protected as such in the country of origin. Also noteworthy are the 1883 Paris Union Agreement, the Madrid Agreement of 1891, and the 1995 Agreement on Trade-Related Aspects of Intellectual Property-TRIPS.

Among the advantages granted by the aforementioned legal protections, in addition to the reputation and the economic and competitive benefits derived from such fact, a negative right is indicated, which is the right to prevent other people from using the distinctive sign of which they are beneficiaries, or that they register as a trademark the same distinctive sign protected with the denomination (Pachón, 1986, p. 3); that is to say, using this registration, the capacity is reached that a designation of origin can prevent "other people from offering products that reach the degree of quality that such origin has made known"(Pérez de la Cruz, 2008, p. 53), or that brands with similar signs that may generate confusion in the market.

Under this situation, the existence of quality control systems is implicitly required to continually examine whether the collective benefit is fulfilling its purposes and whether access to authentic and original products is being guaranteed to the consumer.

Regarding the procedure for the recognition of an Andean or third country designation of origin to operate, the application must be submitted by producers, manufacturers or artisans who have a legitimate interest, or by the competent authorities of the place, where the denomination comes. It is also necessary for recognition in another Andean country that the designation of origin is protected as such in a country. In Ecuador, the Organic Code of the Social Economy of Knowledge, Creativity and Innovation, from Art. 428 to Art. 458, provides the necessary regulations for the recognition, registration and protection of designations of origin and geographical indications[2], indicating the requirements to grant legal recognition thereof.

2 These can be assimilated to the so-called 'guaranteed traditional specialities', named in the latter way by the already mentioned Organic Code of the Social Economy of Knowledge, Creativity and Innovation.

Thus, an appellation of origin will be protected from the declaration that it grants, and that has been issued by the competent national authority on intellectual rights (Art. 430). In this regard, the declaration of protection of a designation of origin will be made ex officio or at the request of those who demonstrate that they have a legitimate interest, understood as such to natural or legal persons who are directly engaged in the production, extraction or elaboration of the product or products that are intended to designate with the designation of origin, as well as the associations made up of said persons (Art. 431). It is important to note that, according to the law, the public authorities of the decentralized central or autonomous administration will also consider themselves interested, in the case of appellations of origin of their respective constituencies, which allows national and local governments to be able to effectively take advantage of this legal framework to support the promotion of economic development in their respective territorial jurisdictions.

On the other hand, it is necessary to observe that according to the law, the term of validity of the declaration as mentioned above of protection of an appellation of origin is indefinite, being determined only by the subsistence of the conditions that motivated it, in the opinion of the authority competent national in the field of intellectual rights (Art. 433). As an example of what has been said, one can consider, among many others, geographical conditions such as temperature or humidity level of the environment; and human conditions such as the existence (verifiable) in the population of the determined geographic place, of the ancestral knowledge to elaborate a finished product.

If such conditions have not been maintained, the competent authority may decide on the term of the declaration. However, and without prejudice to the legal remedies that may arise against the said resolution, the interested parties may request the declaration of protection again when they consider that the conditions for their protection have been restored.

Furthermore, it is normatively essential to keep in mind that according to the law mentioned above, once a protection application has been admitted for processing, the procedure provided for the registration of trademarks will be applied, where appropriate. (Ingenios Code, 2016, Art. 432)

The normative evolution in the matter is not exclusive to our country; In this way, several Latin American countries and others worldwide have been adapting their legal system progressively and in constant evolution towards a legal framework that covers the recognition, protection and control of designations of origin and geographical indications, from a harmonized approach and according to the public policies of each country.

On the other hand, it is necessary to highlight that the proactive and flexible approach currently held by intellectual property regulations, to promote the protection of designations of origin and geographical indications, is a crucial element to follow in order to expand trade at the local level, being endorsed globally by the standards of the World Intellectual Property Organization and the World Trade Organization.

Although Ecuador already contemplates the corresponding procedures for the registration of designations of origin in the aforementioned Organic Code of the Social Economy of Knowledge, Creativity and Innovation, the need to incorporate more control into the quality of the products that they already enjoy of a designation of origin or geographical indication is essential, which is why the simultaneous creation of Regulatory Councils of each designation of origin or geographical indication is necessary, as collective entities in charge of the functions of monitoring, evaluation and control, of the excellent use of designations of origin and registered geographical indications. However, this type of council has not yet been created in the country, despite being a figure present in the various legislations that have chosen to incorporate these legal protection figures normatively, these functions currently being assigned to the National Service of Intellectual Rights (SENADI). However, it is essential to highlight that this public body already has multiple functions to fulfil within the

field of intellectual property in the country. For this reason, it would be desirable for the creation of regulatory councils in the coming years, as specific spaces for dialogue and technical supervision of geographical indications and appellations of origin that arise in Ecuador, contributing to their multiplication and strengthening.

As an essential step towards achieving this objective, dated February 21, 2019, the Secretary of Higher Education, Science, Technology and Innovation (Senescyt); the National Service of Intellectual Rights (Senadi); the Ministry of Production, Foreign Trade, Investments and Fisheries (Mpceip); and, the Ministry of Agriculture and Livestock (MAG) signed an agreement for the promotion and protection of the so-called National Denomination of Origin System. The signing of this agreement will allow the participating institutions to carry out an articulated and coordinated work to boost the production and quality of Ecuadorian products, considering that a designation of origin makes grow economically, not only to producers but to their entire environment. (National Secretariat for Higher Education, Science, Technology and Innovation, 2019)

No doubt developing countries are at a disadvantage in achieving the protection of appellations of origin and geographical indications against developed countries, due to the limited budgets available to cover the costs of the registration and maintenance processes of these, as well as due to the still weak public policies of state support (central and local), which despite the multiple benefits for economic development already mentioned throughout this document, still maintain a low level of interest in support the emergence of new designations of origin and geographical indications in their territories.

In this respect, public support has become a fundamental piece in the consolidation of the specialized brands (appellations of origin and geographical indications) of the country (e.g. through the financing of regulatory councils), considering that in reality, initially Of all these processes, state support is deficient, being solved in many cases thanks to international cooperation. However, it should not be lost sight that the State and the different national organizations

are the calls to guarantee the continuity and consolidation of the designation of origin or geographical indication, the sustainability and improvement of production, its homogeneity, and in general, the equitable socio-economic development of all the inhabitants of each region or territory benefited by this type of specific brand.

In developed countries, it has been observed that the key to properly developing appellations of origin and geographical indications is to promote an adequate public-private productive coordination, in which on the one hand, the productive agents of the territory themselves participate, whom they know in detail the characteristics of the traditional products that they possess and are feasible to be registered. On the other hand, the central and local State participates, who has the knowledge of the legal and technical requirements and procedures that must be followed in case of requesting their registration, as well as the resources to carry out prior market studies and pay for the promotion costs. Commercial and positioning (/ inside and outside the country) of the appellations of origin and registered geographical indications.

In the particular Ecuadorian case, although the first actions in this area have already begun, there is still a long way to go; There are regulatory tools that facilitate the promotion of new designations of origin and geographical indications. However, state support is still deficient in this process, the possibility of potentiating national economic development through these legal instruments not being adequately exploited.

Finally, it is essential to mention that the international (and local) legal framework in force makes possible the fact that, at the same time, a geographical indication and a designation of origin can coexist on the same product, and therefore the same product may have “double protection “. An excellent example of this is the case of French Champagne, which is registered as a geographical indication and as a designation of origin.

1.6. Considerations regarding the expansion of the legal protection of geographical indications and designations of origin, in Ecuador

It should be remembered that the use of appellations of origin and geographical indications is the natural consequence of traditional products of high quality and that enjoys an excellent reputation within and outside its geography, constituting for a territory "endogenous" driver of its development. Here is the importance of protecting them legally, in order to ensure that their beneficial effects are long-lasting and stable in the long term.

An aspect of particular importance also to remember, especially for developing countries such as Ecuador, is that the use of geographical indications is not limited to agricultural products, since it may also serve to highlight the specific qualities of a product as a result of human factors specific to a place or region (e.g. skills based on ancestral knowledge), making this place or region more attractive to foreign investment and tourism.

Let us remember that in our country, for example, artisanal products have been protected in this way, in which specific knowledge and manufacturing skills acquire particular relevance, such as the Montecristi as mentioned earlier hat (registered only in 2008), concerning which the state's inaction to promote its registration (a century ago) and the confusion caused by world consumers when acquiring this high-quality product made in Ecuador, but named with the emblem of another country (Panama Hat), has meant significant economic losses for the country, along with a regrettable more significant, indeterminable and unrecoverable loss: national identity.

This example reflects the need for the State to take action on the matter promptly, concerning promoting the registration of appellations of origin and geographical indications; and besides, that through dissemination campaigns, the interest of the country's citizens in protecting traditional products from their habitat is motivated. However, it is undoubtedly

regrettable to recognize that, perhaps mired in ignorance of its many benefits, most of the country's inhabitants have indeed not shown an interest in protecting the rich cultural heritage and rich traditions present in the different geographical regions of the country.

On the other hand, it should be said that within the legal field, over time, the legal basis of protection for geographical indications and appellations of origin has been defined and perfected. Thus, a short time ago (early 20th century), its protection was incorporated exclusively into the field of consumer rights and defense against unfair competition. However, it has evolved rapidly, and in the current 21st century, this protection is definitively recognized within the specific field of industrial property, and therefore all the pertinent legal regulations are applicable, at national and international level.

Concerning this last point, it is worth mentioning that two protection systems coexist at the international level: i) the European one, where the tendency is for geographical indications and appellations of origin to be defined and granted through legal systems highly controlled by the State (or from the groupings of countries, such as those belonging to the European Union); and, ii) the North American, where the issue of geographical indications and designations of origin has been treated as a matter related to the field of trademarks, which allows its greater diffusion in the population and privileges its commercial use over the centralized protectionism. Thus, in the United States, the registration of collective or certification marks is used as a legal mechanism for the protection of geographical indications and designations of origin.

In this sense, at the international level the need to generate agreements that harmonize the different existing legal positions has become visible, and in this way, be able to advance in the construction of regional or international economic integration processes, through the development of legal commitments specific on intellectual property issues, with jurisdiction over the territory of the countries subscribing to these agreements. An example of this is the Agreement

on Trade-Related Aspects of Intellectual Property-TRIPS, promoted by the World Trade Organization.

In the Ecuadorian case, it is necessary to incorporate into the various efforts that the country makes to achieve trade agreements of international scope (such as the Trade Agreement with the European Union -in force from January 1, 2017- or the possible similar agreements with the United States or other countries), a shared vision regarding the protection and promotion of national designations of origin, at the level of the various state agencies participating in these negotiation processes, to harmonize criteria and join efforts.

In this sense, it will also be necessary to consider that the current national legal framework based on the Organic Code of the Social Economy of Knowledge, Creativity and Innovation, facilitates the protection of geographical indications and designations of origin, by registering them, considering for this purpose, a relatively new particular regulatory framework, which allows its assimilation to the trademark registration regime already in force in Ecuador for many years and with which we have extensive experience.

It is also necessary to say that, having a specific registry system for designations of origin and geographical indications, can be considered as a strength for Ecuador, since it allows dynamically and democratically, that any person (natural or legal) or Human group that is interested in the protection of a geographical indication or denomination of origin, can request it directly, without having to previously ‘negotiate’ with someone this action, and without the need to modify the existing legal framework. Besides, the system provided for in the Organic Code of the Social Economy of Knowledge, Creativity and Innovation, grants over time greater security and solidity to the various plans, programs or projects of local economic development that are designed and implemented, since that guarantees both the inhabitants of the place, the potential investors and the state organisms that promote these actions, that the registration is granted indefinitely.

On the other hand, this registry system has the advantage of being able to promote only those appellations of origin that are really of interest to Ecuador, avoiding unnecessary saturation with countless applications for the registration of appellations of origin, lacking real possibilities of commercial success. This situation constitutes a sine qua non-requirement for the long-term success and self-sustainability of these specialized brands.

CONCLUSIONS

Over time, geographical indications and designations of origin are elements of transcendental importance in the protection of the cultural heritage of humanity, through the protection of ancestral knowledge applied in the elaboration of various products, such as food, beverages and textiles, as well as the particular geographical conditions of the place where its producers live, allowing them to become known and position themselves worldwide as exclusive holders of high-quality and prestigious products.

Based on the legal regulations in force overtime, and currently, present at international and local levels, geographical indications and designations of origin are considered instruments of intellectual property law, capable of promoting the economic development of a determined locality, territory or country, thus favouring the appearance of positive endogenous and exogenous factors, such as the generation of sources of employment, the capture of direct productive investment (national and foreign), the generation of sustained tourist flows, the increase of the currencies that enter a nation through exports, more significant capture of fiscal income for the national states, among others.

The legal framework in force in Ecuador made up of international (e.g. TRIPS, Decision 486) and national laws (Organic Code of the Social Economy of Knowledge, Creativity and Innovation), enables the development of initiatives of national and local scope, that promote the protection of new designations of origin and geographical indications, for the

benefit of the economic development of the country and its inhabitants.

It is necessary for the Ecuadorian State, through the central and local governments, to develop plans, programs, and projects aimed at spreading knowledge regarding designations of origin and geographical indications in the country.

It is relevant to motivate a greater use of them, in all-natural regions, provinces and cantons of Ecuador, which will help protect local cultural heritage, strengthen national identity, and benefit more significant and better opportunities for productive employment and sustainable income for large segments of the population.

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Jorge Núñez Grijalva: Lawyer, Universidad Nacional de Loja; Master en Economía y Derecho del Consumo, Universidad de Castilla La Mancha; Doctor en Ciencias Jurídicas, Universidad Católica Argentina. Profesor Titular de la Pontificia Universidad Católica del Ecuador Sede Ambato.

Email: jnunez@pucesa.edu.ec

Daniela Núñez Viera: Lawyer, Pontificia Universidad Católica del Ecuador; Master of Arts in International Trade, Universitá degli Studi di Palermo.

Email: daninu@hotmail.com

Dayana Madrid Villacís: Lawyer, Pontificia Universidad Católica del Ecuador

Email: dayamv-17@live.com

City: Ambato

Country: Ecuador

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Economic analysis of Intellectual Property: Thoughts on the Ecuadorian case

Análisis económico de la propiedad intelectual: consideraciones del Caso Ecuatoriano

Angel Fabián Albán de Saá: Head of litigation at Meythaler & Zambrano Lawyers
City: Quito
Country: Ecuador

Mary Mar Samaniego Alcívar: Deputy Head of Criminal Department at Meythaler & Zambrano Lawyers
City: Quito
Pais: Ecuador

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RESUMEN: El Análisis Económico del Derecho de la Propiedad Intelectual permite comprender de mejor manera, la preferencia a la generación de un ordenamiento jurídico que proteja los derechos de propiedad intelectual, coma una forma de generar incentivos sociales más eficientes para promover su creación por cuanto permitirá al creador recuperar los costos incurridos y obtener los beneficios esperados.

PALABRAS CLAVE: derechos de autor, norma jurídica, monopolio, creación, derecho económico.

ABSTRACT: The Economic Analysis of Intellectual Property Law allows us to understand better the importance of generating a legal system that protects intellectual property rights and generates more efficient social incentives and promote creation. Social incentives will allow creators to recover the costs incurred and obtain the expected benefits.

KEYWORDS: copyright, legal standard, monopoly, creation, economic law.

INTRODUCTION

Property and the right to own it began their history from the earliest times where man sought to deny the use of what was "his" to other men. Then, the cost of obtaining and appropriating goods was the use of force.

Therefore, property law has its origin in the most in-depth part of human evolution. Unfortunately, there is no certainty about the precise way and time in which man created the concept of property right. The only certainty now is that all countries, regardless of their ideological tendency, maintain different forms of property: public, private, mixed, intellectual, collective, among others.

Undoubtedly, people's right to property has become one of the most helpful methods for social development since it is regulated in different trends depending even on people's beliefs. There will be those societies where only men have the right to property, not women. Moreover, let us not forget that property rights were applied to men before the 1800s. Without getting into greater detail, the concept of property rights itself allows to extract the component elements of it:

1. Real Academia Española (2014) defines property as the "right or faculty to own something and to be able to dispose of it within legal limits; something that is subject to the domain, especially if it is real estate or root."

   It defines industrial property as the ¨exclusive exploitation right over trade names, trademarks, and patents, which the law recognizes for a certain period¨ (Real Academia Española, 2014); and intellectual property as the ¨right of exclusive exploitation over literary or artistic works, which the law recognizes to the author for a specified period." (Real Academia Española, 2014).

2. The law understands property as "domain", and it defines it as a "real right in a tangible thing, to enjoy and dispose of it arbitrarily, not being against the law or the rights of others. The territory that is under the domination of a State or a sovereign." (Civil Code Ecuador, 2005, art. 599)
3. In economics, it is good that capital is being used for production.

The following elements can be obtained from these definitions, using the microeconomics simplification tool of the economic analysis of law:

1. The property requires the existence of a natural or legal person who will be referred to as owner;
2. It also needs the existence of a good that can be real, movable, immovable, informational, intellectual, or of any other kind;
3. The link between the first and the second element is the intention of keeping the property under their control. It refers to the relation of possession between the owner and the property;
4. In order to guarantee, encourage, recognize and protect the property, an organization is responsible for registering or providing protection to the property (it is usually the State); and,
5. As it will be argued in this paper, an essential element to define property is the cost-benefit analysis. Although it is not incorporated in property definitions, it is studied by economics and allows to understand the rationale for protecting property by the creation of "property rights.

These elements make it possible to observe natural or legal people can own that property. That there are different types of property. That a property enables owners to fulfil their condition of belonging, it is essential to obtain a benefit, "the cost", and to be protected by a standard and an entity.

When it comes to ownership of real assets, it can be easily proven, rivalled or excluded when their owner shows his possession with the respective property registry or mercantile

inscription. However, to prove ownership of dematerialized goods is not an easy task due to the inherent high cost of obtaining, protecting, and recognizing their property.

As goods are less tangible, costs to create, protect, delimit, and to incentivize obtaining and generating property are higher. Therefore, it is necessary to look for different forms for protecting this less material property. Owners will not have incentives to maintain it, invest in it, and to enjoy it without protective measures in place.

The legal analysis of the property is valid, but combining it with economics strengthens it and can produce deductions closer to reality. Such findings will allow us to understand the reason why public policies prefer the protection of intellectual property.

In this context, the economic analysis of law, as a trend that combines law with economics, seeks to understand and predict the effects and consequences that a norm has on subjects' behaviour (Posner, 1998). In Law, legislators elaborate norms considering that they will have specific effects on people's conduct, but in reality, they may have different ones. As it is logical, legislators on their own cannot visualize all possible responses.

Economics gets ahead of individuals' behaviours, therefore, applying it with legal sciences generate different alternatives of understanding all possible people's attitudes facing a particular legal situation or norm.

The economic analysis of law is based on a welfare economy, "must be" decisions. It determines how a norm should be formulated based on a cost-benefit analysis, mainly considering:

1. People whose well-being is relevant to decision-making in the present.
2. (Bentham, 1993). Then, the well-being of each individual must be added to obtain the expected social benefit. (Duarte & Jimenez, 2007)

3. The search for an equitable distribution of resources (cost), therefore, the economic analysis of law is a social science that seeks to resolve the dilemma of applying norms based on the effects it will have. It proposes all behavioural alternatives for the people destined to respect or apply the norm. The study of the influence of a norm on people's behaviours requires considering the following microeconomics rules:

    a. Rationality: People subject to legal norms behave rationally according to their perspectives, criteria, interests, and preferences, not erratic, arbitrary, or servile.
    b. Consequentialism. - For anticipating the possible consequences that the rules may have on the behaviour of the people subject to them.
    c. Simplification. - the analysis is reduced to the most relevant factors of the events.
    d. Contrast. - in order to know the operation of the legal norm in reality. For determining the effects of the rule, a period must be considered from its issuance to analyze the effects of the rule. (Coase, 1960, cited by Beyer, 1992)

This research paper aims to analyze the economic and legal arguments for intellectual property protection through the so-called property right. It also focuses on intangible goods incorporated within the intellectual property in order to explain why it is preferable to protect property rights. Finally, it proposes using market distortion techniques - monopolies - as an efficient method to generate incentives for creating, regulating and protecting less tangible property.

1. PROPERTY AND PROPERTY RIGHTS IN ECUADOR

Ecuador has already covered property rights by developing regulations for their protection. Consequently, the necessary cost for creating property rights has been assumed, which reduces transaction costs on possible disputes over property rights as established by the Coase Theorem. (Coase, 1960, cited by Beyer, 1992)

As the State of Law, the Constitution of the Republic of Ecuador (2008) recognizes several types and forms of property. Its Chapter Six - Rights to Liberty, article 66, numeral 26 expresses: "People are recognized and guaranteed: (...) 26. The right to property in all its forms, with social and environmental function and responsibility. The right to access the property will become effective with the adoption of public policies, among other measures." (CRE, 2008). The Constitution also recognizes a Public Registry of Property in its article 265: "The public system of property registration will be administered concurrently between the Executive and the municipalities" (CRE, 2008). Therefore, excluding any form of private registry of property. (CRE, 2008)

Being the State the legal person in charge of recognizing and ensuring society's rights, it is clear that its primary obligation must be applying welfare economics while carrying out its activities and making decisions. The Article 321 of the Constitution supports it by stating that "The State recognizes and guarantees the right to property in its public, private, community, state, associative, cooperative, mixed forms, and that it must fulfil its <u>social</u> and environmental <u>function.</u>". (CRE, 2008) (Emphasis out of text)

Thus, the constitutional principles necessary for the creation and protection of property already exist and are recognized in Ecuadorian legislation since the Civil Code. For many, the Civil Code includes concepts that are applied at various stages of society, and that includes, not only rules that regulate the private sector, but also, standards of conduct that must be observed by society and regulated by the public sector. This Code also contains several provisions that regulate property.

The article 599 of the Civil Code defines domain -ownership- as: "(...) the real right in a tangible thing, to enjoy and dispose of it, by the provisions of the law and respecting the rights of others, whether individual or social (...)" (Civil Code Ecuador, 2005). The article 600 recognizes ownership on intangible things by saying that: "There is also a kind of

property over incorporeal things. The usufructuary has his right of usufruct." (Civil Code Ecuador, 2005)

The text of the transcribed norm is clear. It leaves no doubt that it came from some great jurists' extended analysis. They did not only create concepts using intellectual exercise. They had valuable reasons. Nevertheless, what were these? What did encourage the legislator to divide public property from private, from real to intellectual property?

When the economic analysis of law is included in these premises, it is possible to understand and answer these questions. It is possible to understand many of the reasons why the property has protection and its classification. For example, the economic analysis of law can explain when a property is public or private based on the so-called "tragedy of the commons". (Heller & Eisenberg, 1998)[1]

The idea of dividing public from private property was born when biologists tried to theorize the extinction of species. They asked themselves about what occurs when there are exploitation and excessive consumption of plant or animal species (goods, property), without there being control over it (protection). (Lloyd, 1833)

Then, the anti-commons problem considered that exclusive goods (private property) allow incorporating the criterion of time (cost) and the future consequences of actions on the ownership of goods (benefits). In other words, exclusive assets allow their owner to internalize the future benefits of investments made in work, capital, and opportunity costs (guarantee ownership), which does not happen when there is no exclusivity on goods.

1 The term "anti-commons tragedy" was coined in 1998 in a Harvard's Law Review article written by Michael Heller, a professor at Columbia Law School. In a same-year Science article, Heller, along with Rebecca Eisenberg, argued that biomedical research was one of several critical areas in which patent competition could prevent innovation and prevent better products from ending up on the market. Proponents of this theory suggest that too many property rights can backfire and reduce innovation.

On the contrary, if there is a property that belongs to everyone, there are fewer incentives to own and exploit it individually or jointly. The individual benefit (for instance, the rent) will be so low that no one will want to invest in its exploitation. Even though the operating costs may be lower, the supply of the goods will be so high that the sale prices would not be enough to cover the operating costs. Overall, non-exclusive goods destroy resources (extinction), due to over-exploitation, and even, less production than desired.

In other words, if there is only one owner (i) or the exploitation of the property is regulated by the State (ii), the owner or the State will determine the limits of exploitation, since they receive all the benefits and assume all the costs, trying to adopt the optimal level of production.

The right to property has costs which must be analyzed in order to get clarity to defend, protect, use, and ultimately decide whether or not to own property. It can be concluded that property can only be had when the benefit obtained is higher than the cost of doing it; or when the benefit of protecting it is greater than the benefit of not protecting it.

In this case, it can be concluded that when a property belongs to all, there will be no incentives to produce or exploit it. Therefore, the ownership of property should belong to the State (Tétrel, 2006). As could be observed with this brief example, the economic analysis of law helped to identify the reasons why there can be private and public goods (private property and public property).

2. ECONOMIC ANALYSIS OF PROPERTY IN ECUADOR

Although this document will develop the concepts and definitions of intellectual property, it will take several elements of the concept of "property" to explain it in its application in the Ecuadorian scenario based on the economic analysis of law.

To explain the concept of "property", the economic analysis of law analyzes the costs of creation and protection (i), transaction costs (ii), and exclusion costs (iii).

Firstly, the economic analysis of property must consider the costs of creating and protecting property regulations, which will include the costs of forecasting and creating the rule (i), the costs of identifying and detaining violators (ii), and the costs of sanctioning them (iii).

These costs in Ecuador have been incurred because there are already widely developed regulations in the Ecuadorian legal system (Civil Code, Property Registry Law, Commercial Registry Law, Ingenious Code).

The costs described above are part of the economic analysis of property rights, and in several cases, they explain the benefits that different conceptions of goods have:

a. In the event of substitute goods (Cortés, 1973) different goods can provide the same effect (two types of cars) that occurs when there are many manufacturers or providers (creation cost) of the same or similar good or service. The competition is attractive since producers will compete for price, quality, benefits, which will cause a social benefit.

   The Constitution of the Republic of Ecuador establishes as an obligation of the State, to promote a competitive market, privileging it against monopoly and unfair competition. However, when they are public goods or when their creation or exploitation do not generate necessary incentives for individual production, the State is also allowed to control the market, creating public companies, regulating prices, and generating legal monopolies. Its article 335 expresses:
   <u>The State will</u> regulate, control and <u>intervene</u>, <u>when necessary</u>, in economic exchanges and transactions; and it will sanction the exploitation, usury, hoarding, simulation, speculative intermediation of goods and services, as well as all forms of damage to economic rights and public and collective goods. The State will define a price policy aimed at protecting national production, will establish sanction mechanisms to avoid any practice of private monopoly and oligopoly or abuse of a dominant

position in the market and other practices of unfair competition. (CRE, 2008) (Emphasis out of text)

b. In the case of complementary goods (North Holland, 1989) some goods can only be manufactured by one producer (for instance, apps for a type of computer). It means that the quantity supplied is less than the optimal quantity of production; there are higher production costs and lower social well-being.

In this case, competition is eliminated since it is a non-competitive market. It is causing little or overproduction thereof that will not allow optimal production to be generated. The most efficient market structure is the monopoly since it will allow the price to be lower, the quantity higher, and the social welfare greater.

A monopoly is a form of market distortion. Nevertheless, it must be used in this scenario because it generates significantly higher social benefit. Generally, monopolies are recommended when there are not sufficient incentives to produce goods or services in a particular way. In this sense, article 28 of the Organic Law of Regulation and Control of Market Power (2011) allows the development of non-competitive forms:

> The establishment of restrictions on competition will be admissible by reasoned resolution of the Regulatory Board, for reasons of public interest, in any sector of the national economy, in the following cases:
>
> 1. For the development of a state monopoly in favour of the public interest;
> 2. For the development of strategic sectors by the Constitution of the Republic;
> 3. For the provision of public services following the Constitution of the Republic;
> 4. For the technological and industrial development of the national economy; and,
> 5. For the implementation of affirmative action or other legal initiatives in favour of the popular and solidarity economy.

> The establishment of restrictions on competition will proceed when specific, concrete and significant benefits are generated to satisfy the general interest, in the field or industry in which they are established, efficiency is increased, and benefits are generated in favour of consumers or users., that justify the application of the same. (Organic Law of Regulation and Control of Market Power, 2011)

Secondly, the theory of economic analysis of law includes the Coase Theorem - Transaction Costs[2], which arguably allows reaching a socially beneficial agreement for the parties. According to the Coase Theorem, neither party can reach its optimum level when transaction costs are high. Therefore, it is necessary to issue a norm that regulates the market, as stated by Coase (1960) "since there are transaction costs, the legal rule is necessary to achieve economic efficiency". (Coase, 1960, cited by Beyer, 1992)

This, because regulation reduces transaction costs, and allows, among others things, to identify the owner (i), reduce the risk of losing the property (ii), since as explained by Coase (1960) "when transaction costs are zero (0) whatever the legal rule will reach the most economically efficient result ". (Coase, 1960, cited by Beyer, 1992)

For a better understanding, the types of transaction cost, on which this theory is based, are analyzed below:

a. Coordination costs. - the expenses involved in the transfer of the parties to reach an agreement, such as the transfer, determination of their identity, costs of delimiting the ownership of a property, protection costs, and others. (North, 1995. p .9)
b. Motivation and negotiation costs. - These are the costs that

2 The 1960 article The problem of Social Cost, 'The problem of social cost', is considered the most cited article in the economic literature of all times and countries. However, its central ideas were already explicit in the article The Nature of the Firm ("The nature of the company") of 1937, in which he explains that any price allocation system has a cost and that it is possible to make an economic analysis of the rules, the forms of organization and the payment methods

prevent an agreement from being concluded: 1. Specific assets understood as investments that have no value or are less valued outside the contract. Sometimes, in the transaction is necessary that one of the parties invests in something that has no value outside the agreement, with which the value is reduced or becomes null: and 2. Asymmetry of the information, since the comprehensive information is ideal from an economic point of view, but the differences in information between the contractors prevent an agreement from being reached and make the agreements, not the most optimal. (North, 1996, p. 5)

c. Supervision costs and effectiveness of the agreement. - getting the agreements to be fulfilled is not free; it is necessary to tolerate that not all the commitments are fulfilled. (Raimondi, 1980, p. 612)

Thirdly, it is necessary to analyze the costs of property exclusion (iv), which occur when there are many rights holders, and all can prevent or exclude the use of the property. This produces deficient exploitation and supply of the resource. The economic, legal theory incorporates the analysis of the costs of exclusion and provision when there are public goods. They are those whose use by one individual does not reduce the possibility of use by another individual (non-rival), those who do not contribute to its production (not excludable) and cannot be excluded from use. (Fischer et al., 1987)

In this case, as was briefly analyzed, when it comes to public goods, the solution is that they are provided or administered by the State, or that exclusive property rights are defined, such as the case of concessions, or monopoly, and other forms of market distortion.

The article 604 of the Ecuadorian Civil Code defines public goods when specifying that: ¨ (...) National goods <u>whose use does not generally belong to the inhabitants</u> are called state property or fiscal property.” (Civil Code Ecuador, 2008) (Emphasis out of text). This demonstrates that the referred exclusion costs are fully incorporated into the Ecuadorian legal system by establishing the ownership of public goods as like they do NOT belong to the inhabitants.

In two of the three briefly described considerations, it can be seen that when it comes to goods with several producers, the social benefit decreases. On the other hand, when it comes to public goods (non-rival and non-excludable), the theory shows that the State's administration or MONOPOLY is the most efficient forms of market.

2.1. Intellectual Property in Ecuador

Intellectual property must have a justification for granting exclusive exploitation rights, opposable and excludable to third parties since exclusive rights can be though as other forms of monopoly.

Monopolies, as a market distortion, have to be applied in a timely manner and as long as they do not affect the rights of individuals. There is a large number of regulations that control their formation, which will also be analyzed in this document.

The economic analysis of intellectual property helps legal experts and decision-makers in public policy to understand that structural and institutional factors have configured the right of this type of property. Economics allows analyzing individuals' possible behaviours, as the science that best values effects of regulations and intellectual property policies.

Intellectual property is a form of property that contains the concepts of regulation and protection of intangible assets that, in the end, will have a practical application, the intellectual creation.

In this case, we are faced with goods and services that can be created by various producers who will cause the following negative cost-benefit consequences: not covering the costs of production (i), loss of social welfare value (ii), and consequently, loss of incentives for creation, as it will be over or under-production (iii).

It is essential to mention that in the Ecuadorian case, the so-called coordination costs have been incurred (normative creation, the definition of the owner, property delimitation) so

that the Constitution of the Republic of Ecuador (2008), and the Organic Code of the Social Knowledge-Economy, Creativity, and Innovation (2016), recognize and protect this type of less tangible property in order to generate production efficiency and incentives for all intellectual creation.

Thus, the article 322 of the Constitution of the Republic of Ecuador (2008), expressly recognizes intellectual property and prohibits the misappropriation of goods whose use is not excludable or available to individuals collectively (public goods), by manifesting: "Intellectual property is recognized following the conditions established by law. Any form of appropriation of collective knowledge is prohibited in science, technology, and ancestral knowledge. The appropriation of genetic resources containing biological diversity and agrobiodiversity is also prohibited.".

The same prohibition is established in its article 402, which states: "The granting of rights, including intellectual property rights, on derived or synthesized products, is prohibited and then it is obtained from the collective knowledge associated with national biodiversity." (CRE, 2008). The constitutional norm also recognizes intellectual property in its facet of copyright in its article 601: "The productions of talent or ingenuity are the property of their authors. This property will be governed by special laws." (CRE, 2008)

After constitutionally recognizing this type of property, the Ecuadorian legal system adopted the regulation and protection through its Law; the Intellectual Property Law. The current Organic Code of the Social Knowledge-Economy, Creativity, and Innovation repealed and replaced the Intellectual Property Law by generating an entire institutional framework for regulation and control of all intellectual inventions. It even created the Ecuadorian Institute of Intellectual Property, today the National Secretariat of Intellectual Rights.

The commonly called *Código de Ingenios* (Organic Code of the Social Knowledge-Economy, Creativity and Innovation, 2016), in its article 85 recognizes the protection of this type of property (i) as a tool to promote scientific, technological,

artistic, and cultural development and to encourage innovation.

In other words, the Ecuadorian legislator is aware that, if this type of property is not protected, the intellectual creators, as will be seen later, will not have sufficient incentives to produce which will cause a lack of production eventually. In this way, we began to identify the foundation that the Ecuadorian legislator had to use in order to include this form of property, which is none other than the generation of incentives to produce intellectual goods.

There is a compendium of all the norms that regulate and control intellectual property rights in the Ingenious Code. Its article 85 establishes the protection scope of intellectual rights:

> Art. 85.- Intellectual rights. - Intellectual rights are protected in all their forms, the same that will be acquired following the Constitution, the International Treaties of which Ecuador is a part and this Code. Intellectual rights comprise mainly intellectual property and traditional knowledge. Its regulation constitutes a tool for the adequate management of knowledge, to promote scientific, technological, artistic, and cultural development, as well as encourage innovation. Its acquisition and exercise, as well as its weighting with other rights, will ensure the effective enjoyment of fundamental rights and will contribute to adequate dissemination of knowledge for the benefit of the holders and society.
>
> To the other existing modalities, this Code guarantees protection against unfair competition. (Organic Code of the Social Knowledge-Economy, Creativity and Innovation, 2016)

The article 88 of the same Code expressly establishes its purpose: "Intellectual property rights constitute a tool for the development of creative activity and social innovation. They contribute to technology transfer, access to knowledge and culture, innovation, and reduction of cognitive dependence." (Organic Code of the Social Knowledge-Economy, Creativity

and Innovation, 2016). In this way, the parameters of the existence of standard goods are met, also generating the space for their exclusion from the public domain (rivalry and exclusion).

> Art. 86.- Exception to the public domain. - Intellectual property rights constitute an exception to the public domain to encourage technological, scientific, and artistic development; and, they will respond to the function and social responsibility following the provisions of the Constitution and the Law. Intellectual property may be public, private, community, State, associative, cooperative, and mixed. (Organic Code of the Social Knowledge-Economy, Creativity and Innovation, 2016)

The rationale for protecting intellectual property is to seek the protection of intangible assets. One reason for this type of special protection towards intangible assets, against common property rights, is that social benefits between the two are different. The cost-benefit analysis is necessary for decision-making about public policy norms. Social costs and benefits must be considered against individuals.

Thus, the Ecuadorian constitution itself establishes in its article 85 that when a public policy affects collective rights (social benefits) must be reformulated:

> Art. 85.- The formulation, execution, evaluation and control of public policies and public services that guarantee the rights recognized by the Constitution, will be regulated by the following provisions:
>
> 1. Public policies and the provision of public goods and services will be oriented to make a good living and all rights effective and will be formulated based on the principle of solidarity.
> 2. Without prejudice to the prevalence of the general interest over the private interest, when the effects of the execution of public policies or provision of public goods or services violate or threaten to violate constitutional

rights, the policy or provision must be reformulated, or measures will be adopted alternatives that reconcile conflicting rights.

3. The State will guarantee the equitable and solidary distribution of the budget for the execution of public policies and the provision of public goods and services. In the formulation, execution, evaluation and control of public policies and public services, the participation of individuals, communities, peoples and nationalities will be guaranteed. (CRE, 2008)

The legislator understood that the regulation and protection of intellectual property rights is necessary in order to generate social benefits. The protection of other types of property, such as real property, is as much important as the protection of intellectual property since, without protection, there would be no incentives to produce.

Notwithstanding the preceding, it is necessary to make a small comparison between ownership of both types of property, in order to be sure that the protection of the real property is just as essential as the protection on intellectual property:

a. In both types of property (real and intellectual) there are incentives to innovate and produce, and therefore they both generate income from their use and exploitation.
b. If intangible assets are not protected their universal appropriation is an incentive not to produce since they are non-rival assets. It does not occur in real assets since they are rivals due to their straightforward delimitation.
c. Ownership of tangible assets can be delimited, whereas intangible assets' ownership is impossible or very expensive to establish. Then, regulation is necessary to protect them.
d. The costs of maintaining a property right are high, and in the case of intellectual property rights, their cost of protection is even higher.
The effect of fragmenting intangible property is to increase transaction costs and underutilizes the resource as there are multiple owners. This effect can be reduced

if the transfer and collective contracting of intangible assets are allowed. Diversification of intangible property is not a problem.

e. Rent-seeking is higher in Intellectual Property. Therefore, it generates a more significant social benefit.

f. The cost of protection and enforcement of rights achieves better results (more effective) in intangible property rights.

2.2. Copyright, As Part of Intellectual Property

In the Ecuadorian legislation, according to article 89 of the Organic Code of the Social Knowledge-Economy, Creativity, and Innovation (2016): "Intellectual property rights mainly comprise copyright and related rights, industrial property and plant varieties."

The economic foundation for copyrights, patents, and trademarks is different like explained next:

a. Copyright and patents protect the interests of information or intellectual assets.

All informational or intellectual goods have two essential characteristics: non-rivalry and non-excludability. Regarding the first, as previously described, the use of the good does not diminish the possibilities of use by others; and, concerning the latter, the manufacturer cannot exclude from the use of a good those who do not pay for using it, in this case, the manufacturer cannot recover the investment of the elaboration (Mankiw, 1998, p. 140) Both characteristics cause people not to have benefits to produce, which leads to a severe problem of underproduction of informational goods. Therefore, the legislation grants rights that allow the producer to generate resources for producing and incentives by charging a favourable price. It leaves the producer to determine goods' high price and leads to limited access.

1. Copyright is acquired by the mere fact of its creation.

In patents and trademarks, there is substantial government control. However, copyright registers do not get to determine the existence or not of a right since their ex-ante verification has a very high cost. That plus a large amount of already existing intellectual creation, and the low economic returns of most of the intellectual creations, make it impossible for authors to register their work.

2. Independent creation.

Who duplicates the work of an author by referring to the author does not infringe a right. Protection is given over that duplication. It is justified because the costs of preventing a duplication are high, whereas the benefits of duplication are low. It does not imply taking advantage of the work of others.

3. Protection of expression.

Copyright does not protect ideas but their form of expression since if all costs were protected, including the administrative ones, it would be so high that it would discourage protection.

4. Derivative works.

Authors may authorize the transformation of their work to others.

5. Terms.

Protection terms are established since the costs of creation and licensing increase over time. Copyrights should not be protected exclusively until the point where the creator recovers its creation costs.

6. Protection of non-authors.

Producers, interpreters, and unpublished works are also protected.

On the other hand, the intellectual creation that allows the registration of patents has a high cost; in some cases, more significant than the economic benefit of exploitation. Therefore, it is not recommended that patents are required in the computer and business sectors -industrial property- since they have high costs of definition and protection. In this sense, it is advisable to protect intellectual creations through patents only in cases where the benefits of their exploitation are higher than the cost of creation.

b. Trademarks are goods, but they have no economic value. Their foundation is the power to transmit information to consumers. Consumers associate the quality of a specific manufacturer to a particular good. They avoid searching for another brand which produces incentives for manufacturers to have a certain quality in their production.

Brand dilution behaviours do not generate a risk of confusion or association since a renowned brand by itself makes its use rival and exclusive to others, and registration may be unnecessary.

3. INCENTIVES TO CREATE INTELLECTUAL PROPERTY IN ECUADOR

The Ecuadorian legal system has adopted regulation and protection, but the mere creation of the norm, and its costs, do not justify in isolation the creation of the legal system that protects this type of property. Therefore, incentives should be analyzed (Pindyck & Rubinfeld, 2010, p. 6-7), that is, the prizes or positive benefits that potential creators of intellectual property may have to prefer to create it or not, and thus fully and correctly understand the adoption of intellectual property law.

There are several systems to promote innovation, but this document only analyzes the creation of intellectual property rights, adopted by the Ecuadorian regulatory system, and the free rewards system:

1. The intellectual property rights refer to the legal right of exclusive use granted to the producer of a kind of artificial monopoly. It allows the expected benefits as incentives for intellectual creation to be higher than when competing in an unprotected market. The sale price is higher than the marginal cost (P> Cm), and the number of sales will be more significant since there will only be one producer. In this case, the monopoly is more efficient to generate incentives for production, compared to competitive market models.

   With the creation and protection of intellectual property rights, a legal right of exclusive use is granted to the producer of an informational good (freeriding avoidance theory - ways to avoid the stowaway problem), with which, the sale price caused is higher than the marginal cost of creation.

2. Public rewards. - In this alternative, the State pays the author a contribution, making the property accessible to all. The State covers production costs and should also cover a reasonable profit to the producer to generate incentives for production. However, this system is not recommended because it causes a loss of efficiency since the price and marginal cost disappear in the negotiation or establishment of payment by the State, and the reward may be insufficient, exact, or excessive, generating risks for the State. And for the creator of the intellectual property itself. Furthermore, it would increase the costs of public administration in the transaction, including various quantifiable and considerable effects such as adverse selection problems.

   By the above, it is observed that the public rewards system maintains important criticisms that make it a non-preferred alternative to intellectual property law, since, under the free reward system, the price should not be higher than the marginal cost (i), the profits of the producer will depend on whether there are benefits for the exploitation of intellectual property rights. Therefore, the State cannot establish a real and specific reward before

knowing if the product will have economic returns (ii). Although the incentives to innovate are constant, the State will have the problem of establishing the optimal reward because, at the time of intellectual creation, it will not know the real demand for such creation (iii).

The article 86 of the Organic Code of the Social Knowledge-Economy, Creativity and Innovation (2016) takes the first scheme, the protection of intellectual property, by establishing that "Exception to the public domain. - Intellectual property rights constitute an exception to the public domain to encourage technological, scientific, and artistic; and, they will respond to the function and social responsibility under the provisions of the Constitution and the Law. Intellectual property may be public, private, community, State, associative, cooperative, and mixed." It can be seen that the Ecuadorian legal system preferred the protection of intellectual property rights over other types of incentives to create this type of property.

Intellectual property is a non-rival and non-excludable good because if it were rival and excludable, the creators would have no incentive to produce more books or to create new works. Therefore, in order not to resort to public provision, it has been preferred to grant an exclusive right of exploitation to a legitimate provider of that right. Intellectual property is a form of property like any other, but the intellectual property must enjoy a high level of protection because, without protection, there is no innovation.

However, exclusive rights do not solve the problem of incentives to produce by themselves. The economic theory proves this argument with the so-called Arrow Effect, when it analyzes a competitive inventor and a monopolist, and how incentives change once a patent is acquired. This theory is supported by K.J. Arrow (1962 Nobel Prize winner), who considers that the incentives for research are lower when the market power is high since the marginal cost of production is reduced, and by having inelastic demand, no new incentives for innovation are generated. (Arrow, 1962, cited by Restrepo Zea & Rojas López, 2016)

This theory concludes that the inventor in a competitive market has no incentive to continue creating, since being non-excludable and non-rival goods, their creation and use does not generate the expected benefit to intellectual creation.

CONCLUSIONS

In Ecuador, intellectual property is recognized as a form of property right over intangible assets; and it is protected to generate incentives for its production.

The economic analysis of intellectual property represents one of the best ways to understand and explain why intellectual property rights have been created within the Ecuadorian legal system. The evidence developed shows that creators have sufficient incentives to produce intellectual goods in a market with protection.

In Ecuador, intellectual property rights generate an exclusive right of use and exploitation of property. In other words, they create towards authors a legal monopoly, which will allow the creator of the intellectual property to obtain the expected benefits.

In the absence of intellectual property protection, there are other types of incentives for creation that are less efficient. There are reasons to generate negative incentives for intellectual creation (Public reward, the problem of common goods).

In Ecuador, there is already in place a regulatory system that protects intellectual property. Nevertheless, it can be reformulated to cover social benefit generation.

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Angel Fabián Albán de Saa: Head of litigation, Meythaler & Zambrano Lawyers

Email: falban@lmzabogados.com

City: Quito

Country: Ecuador

Mary Mar Samaniego Alcívar: Deputy head of litigation at Meythaler & Zambrano Lawyers.

Email: msamaniego@lmzabogados.com

City: Quito

Country: Ecuador

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Is industrial property law a catalyst for inequality? Instruments for a holistic legal-economic development

¿Es el derecho de propiedad industrial un catalizador de la desigualdad? Instrumentos para un desarrollo jurídico-económico holístico

Raúl Alexander Velasco Chávez

Independent legal researcher

City: Quito

Country: Ecuador

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ABSTRACT: This note goes around the role of industrial property. Furthermore, it shows some arguments from the philosophical and socio-political perspective. The emerging questions seek to discuss whether or not the casuistic analysis determines if the Law denotes a hypotactic behaviour towards capital or whether it would be appropriate to define the Law (of Intellectual Property) as a new expression of capitalist servility.

KEYWORDS: Intellectual property, industry property, capitalism, capitalist systems, market economy, politics

RESUMEN: Esta miscelánea tiene como objetivo reflexionar entorno a las relaciones centrales entre el derecho de propiedad industrial y el desarrollo, entendido desde una acepción holística. En la primera sección se discuten algunas generalidades respecto a la propiedad intelectual que serán de gran utilidad instrumental a lo largo del escrito. En la segunda sección se explican los recursos metodológicos empleados, el alcance de la investigación, los usos de fuentes y las aproximaciones cognitivas que se pretenden alcanzar. En la

tercera sección se presenta una síntesis de los resultados a los que se ha arribado mediante la investigación. A continuación, se discuten los resultados presentados y se reflexiona acerca del cumplimiento de la hipótesis. Finalmente, se esboza un corolario y el planteamiento de nuevas interrogantes derivadas de esta indagación preliminar.

PALABRAS CLAVE: Propiedad intelectual, propiedad industrial, capitalismo, economía de mercado, economía de mercado, política

INTRODUCTION

"Civil law serves to rob the rich of the poor. Criminal law serves to prevent the poor from stealing from the rich." This French aphorism compiled by Mayol (2017) elucidates what authors of heterodox currents, such as Althusser (1970), would verbalize as the subordination of the legal dimension to the interests of the ruling class. In this sense, this research on the role of the industrial property could be initiated by asking: Are there new actors in the contemporary era that pluralize and abstract the already mentioned ruling class? Can case-law analysis determine that law has a hypotactic behavior toward capital? Moreover, finally, would it be correct to define Intellectual Property Law as the most natural expression of capitalist servility?

This miscellaneous article aims to conjecture the central relations between industrial property law and development, understood from a holistic point of view. The first section will discuss some generalities regarding intellectual property that will be of great instrumental use throughout the writing. The second section will explain the methodological resources used, the scope of the research, the uses of sources, and the cognitive approaches that intended to be achieved. The third section will present a summary of the results reached through the research. The fourth section will discuss the results presented and reflect on the fulfillment of the hypothesis. Finally, the last section will

be reserved for the outline of a corollary and the raising of new questions arising from this interdisciplinary inquiry.

Having shown the structure of the present research, we will give way to the exposition of some research and legal generalities that will help the reader to understand better and interpret the results and decisions that will emerge in the following paragraphs.

As an introductory basis, it will be worth limiting the understanding of each of the concepts that are developed in the title of the research. On the one hand, the Chilean Institute of Intellectual Property defines Intellectual Property as a branch of law that seeks to encourage innovation, creation and technology transfer, while regulating the organization of the markets for certain intangible assets. With a high degree of concordance, the World Intellectual Property Organization (WIPO, s.f, p.2) gives a similar definition and additionally adds to the dichotomy industrial property-copyright as the taxonomy of the quintessential branch. Within the line of WIPO's ideas, this research focuses on the analysis of regulation within the industrial property, being the patents, the marks, and the industrial designs the primary units of analysis of the work. On the other hand, inequality applied to society will be understood from the perspective of Bregman (2017, p.55), postulating it as a negative social situation in which an individual or group of individuals enjoy certain qualities, quantities, or circumstances favorably diverse concerning others, usually from illegitimate situations. Finally, what is understood as a holistic legal-economic development will be defined? From the critical perspective of the Orthodox economy, holistic development is understood as the progress of society. It leads societies towards a stage where its needs are met to a greater extent than at a previous stage and satisfaction variables cover a multiplicity of dimensions (economic, cultural, social, participatory, degrees of freedom, among others) that encompass the complexity of human coexistence with their environment and their peers (Valcárcel, 2006).

To conclude this section, we will discuss some budgets needed for a comprehensive understanding of research. First, it is clarified that research is not essentially philological or epistemological, so far from genealogical methods or the archeology of words (Foucault, 1981), there will be a full acceptance of words and logical constructions, which will be raised. Second, the deontological questioning of intellectual property will coexist with its ontological development. Therefore, the most advanced philosophical questions regarding the origins of society and the justification of property itself will be treated tangentially, as they exceed the scope of this research. Finally, accepting the complexity of coining generalizable definitions will limit the study to the discussion regarding the understanding of the variables in the terms defined in the preceding paragraphs.

1. METHODOLOGICAL ASPECTS

From the constructivist assumption that absolute truth is unattainable by human beings and the best epistemological aspiration is relative (intelligible) truth within delimited parameters; The methodology of this work is defined as eclectic, as it encompasses a significant diversity of cognitive approach methods. Following Leavy (2014), Gerring (2004), and Hernández (2014), the compatible research classifications have been taken among these authors and as the methodological taxonomy for this miscellaneous. From the type of inference, the work is descriptive, since, for the formal logic, it does not manage to show the causality of the arguments in a strict sense. From the method, the research is mixed, as it takes qualitative arguments (from case studies) to quantitative demonstrations (reproduced from other academic works). From the purpose of the research, this is mixed; that is to say, both confirmatory (since it tries to evaluate if the orthodox theories concerning the concretion of the regulation of the intellectual property have been sufficient) and exploratory (because it tries to construct the bases of a legal theory of the intellectual property

congruent with the case Ecuadorian). The temporal variation is diachronic since the evaluation of the policies related to intellectual property is done in different periods in each case. The analysis method is comparative, as it evaluates various units of analysis in different periods. From the method of inquiry, this research is theoretical, since no empirical studies are generated. According to logical rules, the research is deductive, since it adopts general rules and abstract theories until concrete cases (passage of general to particular). Finally, in terms of obtaining the data, these are from exogenous sources and by different sources, as information is not collected autonomously by direct means with the units of analysis.

1.1 Presentation of results

After having made the main clarifications regarding the scope of the research and the method used. We will proceed to the presentation of the main results divided into four subsections:

a)The countries in development, to a lesser extent, ensure industrial property than developed countries.

b) Increasing Industrial Property Rights is highly correlated with more significant economic growth.

c) In Ecuador, the State should encourage investment in research with a common approach to knowledge.

d) There is a high correlation between the protection of Intellectual Property rights and innovation.

1.1.1 Developing countries secure industrial property to a lesser extent than developed countries

Tejedor, R. Gil, M. & Tejedor, J. (2016) show with an econometric model that developing countries tend to protect property rights to a lesser extent than developed countries, with a high correlation between this premise and that which argues that developing countries invest in Innovation and

Development (in percentage and absolute terms) a lower amount than developed and industrialized countries.

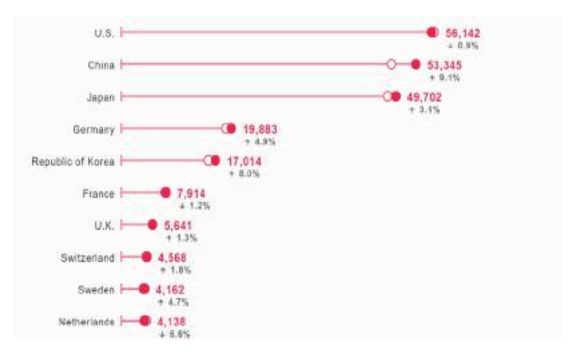
Similarly, patents in the industrial sector are applied to a greater extent in buoyant economies (such as China, Japan, and Asian tigers) than in developing economies (such as China). South American or African).

The presentation of data from the World Intellectual Property Organization (WIPO) corroborates what was stated in the previous paragraph. The economies that apply for patents (See Graph 1) and enact more incisive legislation (See Graph 2) are the most developed countries or those economies that have sustained and emerging growth. It corroborates the premise that patent protection occurs when the technological stock is comparatively larger.

Graph 1: The ten largest patent applicators in the world

Source: OMPI (2019)

Graph 2: The ten most significant users of the PCT system (Patent Control Treaty)



Source: OMPI (2019)

1.1.2 Increasing Industrial Property Rights is highly correlated with higher economic growth

This premise is primarily nourished by the graphs in the previous section, as these explain that the list of countries that most defend industrial property and the use of patents are those that generally have better performance in terms of macroeconomic. In a simulation conducted for the Microsoft company, an increase in intellectual property records would lead to growth in Gross Domestic Product (GDP), investment, trade, domestic consumption, tax collection, and research spending; however, it should be borne in mind that in this simulation unemployment and inequality increased, which linked to the previously introduced concept of holistic development means a contingent and case-dependent outcome, as will be discussed in later sections.

For this premise, it is critical to understand that the correlation does not show causality, so spurious relationships are left open. The premise is true. However, the widespread increase in per capita income and the vast technological advances in various contexts could be other causes that explain this correlation, and the protection of Industrial Property rights is not the leading cause of that.

On the other hand, a high negative correlation between hours worked, and productivity in higher-income countries shows that technology can contribute to improved living conditions in multiple contexts. This graph allows us to conclude that technological progress brings with it a reduction in the working day and thus an increase in the use of consumers and an increase in leisure time ceteris paribus. When finding this relationship and increasing such technology thanks to the development of Intellectual Property law, the premise introduced here becomes valid.

Regarding the role of the State in Ecuador and the optimization of regulations in a logic of social justice and knowledge generation, both official bodies (Senescyt) and various national (Pazos, 2016) and international (Chang, 2016) actors have seen with approval the issuance of the Organic Code of the Social Economy of Knowledge (commonly known as the "Codigo Ingenios"). The central arguments regarding the need to issue regulations other than the regulations enacted by the most developed countries are the technological disadvantage that generates temporary backwardness, the pool of knowledge not patented by native peoples, and opportunity costs to individual social indicators product of the excessive protection of industrial property rights. However, after an exhaustive bibliographic review and observing a multiplicity of multilateral evaluations, the result reached is that the promulgation of the conspicuous "Codigo Ingenios" has not represented a quantitative leap to a knowledge economy or technology-intensive.

The importance of generating an intellectual property right that promotes holistic and cultural context-dependent development, without focusing on the premise that the protection of Intellectual Property effectively produces innovation, can be justified, from an empirical point of view, in the weak correlation between income and social problems.

Finally, as a result of this section, it is stated that there is a clear relationship between social problems and inequality,

which shows that any Industrial Property protection policy that seeks to have positive results in terms of holistic development must to collaborate with the reduction of the inequality and with the concordance of constitutional principles that in the Ecuadorian society are defended so much.

With robust econometric models and complicated equations, Gómez-Valenzuela (2018), Tejedor, R. Gil, M. & Tejedor, J. (2016) and The Competitive Intelligence Unit (2011) substantiate from economic regressions the authentic relationship between the protection of intellectual property rights and innovation; in this way, the possibility of spurious correlations from the methodology used by the same is annulled.

This section only mentions proxy variables for the protection of intellectual property rights, so the analysis has a clear bias in agreement with each author. Its scope is fundamentally quantitative, with a marginal qualitative inference that works best in other sections. What can be assured with greater certainty is that spending on Investment and Development (R&D) is highly correlated with patent registration.

2. THEORETICAL DISCUSSIONS AROUND THE RESULTS

Having presented the main results reached through this research, we will continue to discuss several controversial aspects that emerged as angular inputs of the selection of data and premises set out in the previous section.

2.1 Evaluation of the industrial property protection approach

This section of the discussion will evaluate the two main approaches since Boyle (2003) and Castro (2009) defend industrial property: the protection of industrial property with a capitalist approach and the social economy of knowledge.

On the one hand, the capitalist approach considers it essential to defend knowledge as a private good and to endow it

with that character. Similarly, this approach weighs the market value and believes in the patent transaction as another asset. The central idea of this approach is to weigh profit over equity and efficiency over distributive equality. In this approach, the distribution of income is irrelevant, and the fundamental thing is the increase in the profit on the part of the investors.

The social economy of knowledge is strongly opposed to such privatization and views knowledge as a public good. This approach is more instrumentalist and looks at knowledge as a tool for achieving collective progress inequity and social justice. This approach insists on the positive externalities of knowledge and therefore engages in the collaborative production of knowledge and ideas that Acemoğlu (2012) would call spillover effects. For this approach, knowledge is neither exclusive nor rival, so disseminating it can only have positive effects.

Without a research bias on either approach, this research will discuss some of the more relevant practical aspects of both. It should be clarified that the philosophical, sociological and economic discussion regarding the origins of private property, the original accumulation of capital, systemic spoils, Speen Hamland 1795, the law of enclosures, the tragedy of the anti-commons, exploitation, alienation, alienation, and reification that the capitalist system performs in its actors, as argued by Bourdieu (2001) or Polanyi (1992) transcend the scope of this research, so instead of opting for one of the two currents what will be done is to proceed with eclecticism in the points of the best explanation of each of them.

Something that must be stated in this section is whether knowledge is generated from individual genius or from complex cultural accumulation, which has not been resolved by the social sciences and will continue to be a scientific question. Although this discussion seems minor, it is significantly far from it, as the answer to that could shed light on whether making property rights more restrictive is optimal and fair. Without reaching an unambiguous answer, some utilitarianism, or pragmatism, must

be sought, which momentarily excludes this relevant issue to seek the duty of legal-economic management in intellectual property matters.

If in the previous sections, we talked about the results that connected research and innovation with development (without this necessarily being a holistic development), the question to be asked would be: How to achieve that research and innovation? Although the orthodox recipe has dictated that it is through market liberalization, Ha Joon Chang (2002) has shown that history is far from saying what will be seen in the next paragraph.

One of the founding drivers of this research was whether industrial property protection increased the value of companies for the Ecuadorian context. In that sense, it is shown from three different models (See the first subsection of the Results section) that this is fulfilled; however, there is another version of European cases that can be contrasted with that. In his text A Kick to the Stairs (2002), Chang questions traditional history and explains that there may have been events that moved away from the free market as successful cases. Chang (2001) argues that industrial property encourages costly litigation, reduces the resources available for investment in R&D, discourages the development of new inventions when the inventor enjoys the monopoly of his invention and can live on that income. The social optimum by restricting a seemingly unlimited good, diverting activities to other patentable ones (although they may be less useful), creates high costs by encouraging minimal and useless adjustments to patent, creates legal barriers that restrict competition, and goes against the human principles of cooperation. In that opposition, in the 2002 text mentioned above, Chang cites Switzerland and the Netherlands as examples of economic development far removed from patents. Chang argues that Dutch economic performance improved from 1869 to 1912, where he repealed his patent law (started in 1817). Similarly, in Switzerland, opposition to patent implementation until 1907, according to Chang, promoted the

country's development and allowed it to acquire ideas from Germany and thus increase foreign investment in its industries (something severely punished today).

2.2 Evaluation of industrial property in a historical sense and a regional evaluation

The Orthodox creed has argued that the protection of intellectual property has been inherent in the development, the question to be asked in this section is: has this been true? In 1883 the Paris Convention for the International Protection of Industrial Property emerged, 1891 began the Madrid arrangement that allows the addition of protection mechanisms from bilateralism. With international trademark registration, 1970 is born in shape what is known today as a World Intellectual Property Organization. In 1974 this body was part of the United Nations (WIPO, 2019). This count is important because it seems that the protection of Industrial Property has brought economic development par excellence, but this is, according to Anguita (2016), Boldrin & Levine (2008), and ECLAC (2008), at least questionable.

The existing dichotomy between Import Substitution Industrialization (ISI) and free trade theory has been closely linked to the discussion around intellectual property. Patent protection has always been at the forefront of free trade negotiation agendas, and related clauses were crucial for limiting regional development under that model. Where does the aporia of this link between free trade conditions and patent protection lie? The answer is exceptionally intuitive and is in a double moral standard. As Machlup and Penrose (1950) argue, the most developed countries generated strong protectionism in their industries. In the first instance, they were opposed to allowing extensive patent protections until they had a technological heritage that had the advantage of other countries. Then, the moment in which in an ideal way, they executed the instruments of protection, and they became staunch defenders

of the protection of the patents and the rights of Industrial Property.

As explained in the previous paragraphs, it would seem that the periphery countries are quartered in legal systems that help their development and manage to make forced technological transfers as Switzerland did at the time, but there is nothing more than reality. Decision 291 of the Andean Community of Nations on the treatment of foreign capital, trademarks, patents, licenses, and royalties; Decision 486 on the standard system of industrial property or Decisions 632 and 689 deriving from the 486 have shown a looser defense in regional terms, but a highly incisive stance on compatibility with other international standards and bilateral treaties. They seemed to have greater coercive force on the part of industrialized countries.To conclude this section and see the risk that there has been a lack of clear regulations regarding the protection of industrial property in the case of Monsanto. The situation is that Monsanto went to a large number of countries where there were no deep intellectual property rights and applied conditions from its country of origin. It is essential to show the limitations of unspecific regulations and avoid the servility of politics to large transnationals resulting from an error in delimitation. As Marie-Monique (2008) explains, Monsanto took advantage of several legal loopholes to generate costly patent lawsuits and ban farmers from using their seeds for next year's crop because they contain the famous Roundup Ready (patented by Monsanto). As seen superficially in this example, when there is no precise regulation that operates under fair parameters, it is even possible for a company to sue farmers for continuing millennial practices and trying not to generate a high degree of waste. The Latin American State has a long way to protect the rights prescribed in its constitutions if this excellent business power is compounded by conditioning, corruption, and government interference.

2.3 Evaluation of the Organic Code of the Social Economy of Knowledge (Código Orgánico de la Economía Social de los Conocimientos, la Creatividad y la Innovación)

For evaluating which model of intellectual property protection should be used in Ecuador, it has been fundamental to understand the situation after the conspicuous "Código Ingenios" has been adopted. Due to extension issues, it will not be possible to evaluate in-depth each of the components of the code above, however, after a thorough review of the surrounding literature and the code itself, the central points can be discussed and evaluated from deontology. of Intellectual Property.

The "Codigo Ingenios" links in the first instance a common approach through a large number of articles (especially in the first book) that show principles concerning this research:

a) the socialization of knowledge;
b) the protection of creations with an approach of dissemination of ideas; 3) state support and investment as an engine of innovation;
c) the diffusion and universalization of the Internet as a breakdown of economic barriers to knowledge;
d) the drive for national inventors and small-scale discoveries; and
e) the idea of free software to achieve more widespread access or strengthening of aid to researchers who have high potential but no resources (National Assembly, 2016).

These arguments show the transparent approach of the code. If we compliment them with: the intention to achieve greater access of the population to patent drugs, the fight against scheduled obsolescence (with short-lived technological products). The notion of reverse mining for the recovery of knowledge by people of limited resources or companies with environmental responsibility. Also, the assurance of the rights of ancestral peoples and the acquisition of knowledge through

their historical practices. Then, the fight against biopiracy by the major pharmaceutical companies related to the intangible heritage of ancestral peoples and the policies of greater control over the appropriation of knowledge by foreigners corroborates all that has been said so far regarding this leap in the approach to the protection of Industrial Property rights (Ramirez, 2014).

Everything set out here seems to be in line with the postulates of Professor Chang (2001) and also seems to be in excellent harmony with the progressive halo of the 2008 constitution, however, as stated in the first section of this section, the claim is the normative evaluation from the being and the duty to be able to formulate a suitable and applicable policy.

The behavior of Ecuador's GDP since the issuance of the so-called "Código Ingenios" has not been positive in the slightest and, even with the exclusion of exogenous factors, technological development and innovation have not had any peak. It is prudent to emphasize that empirical evaluation can only be given in the long run and through rigorous mathematical models that exclude non-excluded third parties; however, by using a deductive method in the next paragraph, the hypothetical scope will be explored based on a counterfactual analysis from the optimization ideal.

In the remainder of this section, we will analyze what would have happened with the "Código Ingenios" in another institutional context, in the light of the institutional theory of Acemoğlu (2012) ceteris paribus the Ecuadorian case. Had there been a healthy institutional system, actual State without economic "prebendas," with political independence and with the instrumentation of technical and objective analyzes in decision-making, the regulations, and flexibilities of this code would have had a much more significant and positive result, in aggregate terms. To try to complicate the questioning and talk about the relevance of the code, a brief control of legality and constitutionality will be made with just a legal body and a

constitutional variable. As for the legal body, the Organic Law of Regulation and Control of Market Power will be mentioned, which contrasts the express prohibition of the monopolistic exercise (except for collective interest) with the monopoly granted with a patent. It is critical to understand that a patent is indeed a monopoly by definition, but that this monopoly could have a social utility in certain circumstances, so with a broad interpretation, this can be ruled out. As for the Constitution of the Republic of Ecuador (2008), the idea of a popular and solidarity economy (article 283) would be embroiled in a possible contradiction with the defense of patents. However, again the broad meaning of this defense must be understood. Moreover, it must be emphasized that as seen in previous sections, this defense can help the development of new technologies, and this, in a way, derived from the holistic development discussed in the introductory section.

The final idea that is going to be limited concerning the "Codigo Ingenios" is that, although of very concrete foundations, it is due to connect of the better way with the productive thing with the investigative thing with the eagerness that does not exist a dependence either of the production or of the research and give more excellent stability to the investor, researcher, and producer as Ramírez (2014) rightly argues.

2.4 Some contemporary alternatives to the traditional defense of Industrial Property and some critical views

Some alternatives to the traditional forms of protection of Industrial Property rights will be briefly stated. Before that, it is worth mentioning that both right-wing branches (such as the Austrian school with Hayek and Von Mises) and left-wing branches (such as anarchists and Marxists) argue that alternative means should be developed for the defense of industrial property. Fall into authoritarian controls of other people's property.

Within the previous line of ideas, various mechanisms have been discussed to ensure that trademarks, patents, and licenses operate efficiently, but no longer from an exclusive logic, but the inclusion of all dissemination and channeling mechanisms of knowledge.

According to Buitrago & Castañeda (2011), there are innovative alternatives for the promotion of research and the protection of inventors' rights. Copyleft is proposed as an option to share and reuse the works through free licenses, provided that the practice is maintained free of charge. Another alternative is the creative commons that seek to maintain the recognition of the authors, not to give a commercial use, not to allow derivatives of the works, to maintain the status of free access, but to break the scheme of the private cognitive property. Whatever the path, it is clear that there are alternatives and could be exploited in various ways in the Ecuadorian case, although it should be noted that this does not limit the maintenance of a parallel legal system under more permissive dissemination modalities.

3. CONCLUSIONS

This miscellaneous will end with some critical outputs. In the first instance, it is warned that the excessive protection of intellectual property can be a mechanism for appropriating monopolistic profits, so the State must regulate that incisively. Then, it is mentioned that in order to develop dynamic competitiveness in the context of the great defense of intellectual property, much higher percentages of GDP must be invested in science and technology. Besides, it is argued that the approach must be long-term and that policies must seek strategic spaces for action and partnership.

Also, patents must be prevented from becoming legal barriers and dominant positions held by transnational corporations or large corporations. It is argued that patents are positive in the absolute sense of being made with local technology and product, and the ethical dimension is not

settled due to a double standard of the decision of developed countries. Consequently, it is emphasized that specific sectors need more care, such as medicines and commodities, for human consumption.

Thus, there is a strong influence of transnationals in politics, and negotiations are unbalanced in favor of large transnationals, which must be broken if objective and effective legislation is reached. Regional union and multilateralism are critical solutions to the global logic on a more level playing field. It is consistent with the idea of fitting piracy in all contexts, although the personal and non-profit use of various digital content that advanced international regulations protect must not be severely restricted.

States are urged to promote judicial agility to lower costs and facilitate inevitable litigation that can be complicated and cumbersome. It is so since it is considered that the creation of public libraries with greater access can reduce the technological and cognitive gap within society and worldwide. States must also defend consumer rights and fight against monopolies that may harm them because states can become engines of growth and development with appropriate policies and high investment in R&D. There must be a robust institutional framework that guarantees compliance and avoids the violation of Industrial Property rights. Sixteenth, foreign investment must be attracted to fair and equitable terms without violating the rights of citizens.

Developing countries secure less intellectual property rights due to their need to exploit emerging technology as soon as possible. Furthermore, economic growth will not be equated with holistic development, so the excessive defense of intellectual property rights can lead to investment and economic growth, but increasing inequality and social problems do not lead to real development.

The “Código Ingenios” has brought exciting proposals from the duty to be but has been limited by an application without due rigor. The standard approach to knowledge is consistent with the constitution of Ecuador and various internal norms. The history shows that state intervention has had favorable results, especially for the correction of externalities.

Finally, as a general conclusion of the work, it is essential to mention that Ecuador must seek a pragmatic vision and adopt policies that guarantee on the one hand the protection of the rights of companies and industrial inventors, but on the other hand that guarantees equity in the distribution of benefits and high social justice.

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Raúl Alexander Velasco Chávez

Independent legal researcher

Email: valex1600@gmail.com

City: Quito

Country: Ecuador

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Intellectual property rights in the Ecuadorian music industry: digital media

Derechos de propiedad intelectual en la industria musical ecuatoriana: Medios digitales

Juan Sebastián Aguirre Navarrete
Independent researcher
City: Quito
Country: Ecuador

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ABSTRACT: Inside the panorama of the music industry have been generated by several legal relationships. Generally, the artist is only concerned with expressing his ideas through songs, based on deep feelings or experiences that have marked him, but he does not realize that he is in a very complicated legal relationship when privatizing his creations. Many artists throughout their careers legal issues related to the use of copyrights in their discography; a very recent case is that of the famous artist Taylor Swift where the problem lies in the snatching of their copyright author. This miscellaneous article focuses on identifying the regulations with which the Ecuadorian government protects intellectual property rights in the Ecuadorian music industry in the current digital era. As a final result, we state that Ecuadorian legislation has an optimal regulation that encourages the operation of the intellectual property regime in Ecuador. However, artists do not choose to enter this industry due to the low performance it has in our country.

KEYWORDS: Digitization, recording industry, music, copyright, intellectual property

RESUMEN: Dentro del panorama de la industria musical, se ha generado un sin número de relaciones jurídicas. Generalmente, el artista solo se preocupa por expresar sus ideas a través de canciones, basándose en sentimientos profundos o experiencias que lo han marcado, pero no se percata de que se encuentra en una relación legal muy compleja al momento de privatizar sus creaciones. Muchos artistas a lo largo de su carrera se han visto envueltos en diversos problemas sobre el uso de derechos de autor en su discografía, un caso muy reciente es el de la famosa artista Taylor Swift en donde el problema radica en el arrebato de sus derechos de autor. Este artículo se enfoca en identificar las regulaciones con las que el estado ecuatoriano protege los derechos de propiedad intelectual en la industria musical ecuatoriana, que se desarrollan en el entorno digital. Como producto de esta investigación se puede deducir que la legislación ecuatoriana cuenta con una regulación optima que incentiva el funcionamiento del régimen de propiedad intelectual en el Ecuador, sin embargo, los artistas no optan por introducirse a esta industria por el bajo rendimiento que esta tiene en nuestro país.

PALABRAS CLAVE: Digitalización, industria discográfica, música, derecho de autor, propiedad intelectual.

INTRODUCTION

Musical works are undoubtedly one of the essential categories of works for copyright. For many years, musical authors have exercised high power in the process of claiming copyright. However, recognition was granted to the authors by the Berne Convention for the protection of literary and artistic works of 1886. Then, only the authors of the lyrics and the music of the songs were sheltered, leaving aside the interpreters of musical works, who from the signing of the 1961 Rome Convention recognized these rights with the name of neighbouring rights or neighbouring rights. (Ríos, 2011)

The development and impact of the music industry have not had significant relevance in Ecuador, even though there is a variety of Ecuadorian artists who can easily be great international and even world exponents within this industry. It leads us to wonder about what is the leading cause to understand why in our country music is not in constant development? Although thanks to the various digital platforms such as Spotify, tidal, iTunes, among others, the artists have more facility for distributing their music around the world and thus be able to reach a broader audience.

Therefore, the primary intention of this miscellaneous article is to identify the regulations with which the Ecuadorian government protects intellectual property rights in the Ecuadorian music industry and that are developed in the digital environment. Likewise, this article will serve as a contribution so that the subjects of law which are involved in this industry know their intellectual property rights.

In the first part, we will go through history to analyze the impact that digital technology has had on the music industry, the transformations in this regard and the evolution in the industry, as a result of technological advances, will be explained.

Subsequently, it will begin to conceptualize copyright and related rights that are presented outside the music industry, this in order to have a clear and precise knowledge, which will serve as a basis to identify the problem regarding the protection of rights author in Ecuador.

Later, it is analyzed who are the subjects of law in this industry, what is the role they play, what are the intellectual property rights attributed to them and what legal act supports them. Next, the various mechanisms that protect the copyrights regulated by Ecuadorian legislation will be identified. Finally, conclusions are drawn seeking to encourage artists working for the Ecuadorian Record Industry.

1. IMPACT OF DIGITAL TECHNOLOGY ON THE MUSIC INDUSTRY

In this part of the article, we will analyze the impact and importance that digital technology has had in the music industry in the last four decades. We will also detail how this industry has evolved and what changes have arisen thanks to technology. It will help us to know how technology has been the product of constant changes that have contributed significantly to human development.

In the late 19th century, Thomas Alva Edison, an American scientist and businessman, invented the phonograph. The phonograph was the most common first device to record and reproduce sounds from the 1870s to the 1880s. This device made it easy and fast to record a musical copy multiple time. With the help of this device, the foundations for industrializing the music sector were accentuated. (Arias, 2013, p. 36)

Later in 1982, compact discs were created. Thanks to these, the different users were able to count on a new and improved digital audio, in addition to the fact that they encouraged the commercialization of record formats with a higher economic value that gradually grew. Consequently, the artists and the record companies perceived an increase in their income from the sales of each CD. According to Yudice (2007): "The technologies of the last three decades have influenced everyone's experience, and not only that of the musicians or fans of this or that type of music". (p.18)

In the 1990s, users and listeners had a wide variety of photographic collections. It was not only due to the replacement of the old compact disc formats, but it was also thanks to the double cassette audio equipment in which entire albums could be copied. These factors were essential to demonstrate the tremendous technological advance in the record sector since they allowed storing and reproducing the various songs. (Palmeiro, 2004, p. 4)

All these inventions reached their maximum splendour in the mid-1990s when the development of digital technology and the beginning of multimedia were of vital importance so that computers could reproduce and store the music on compact discs. (Alexander, 2002, p. 153). Likewise, the development of these devices was one of the essential innovation processes of the 20th century concerning the music industry. From that century on, people could listen to their favourite songs on various technological devices, both on sound equipment or through a television screen (Barreto, 1998, p. 21). On the other hand, the digitization of audiovisual content made it possible to include videos and multimedia material on discs using CD-ROM technology. (Pucci del Río, 2008, p. 68)

However, at that time, technological developments in digital music, such as digitization of compact discs and multimedia advances, were still part of the traditional model of the recording industry and did not threaten a complete structural change. It is because of Phonogram revenues left vast profits to sign contracts with great artists of the medium, causing this industry to remain in the physical distribution of compact discs. The same discs contained the musical tracks. (Moyon and Lecocq, 2010, p. 43)

Later, thanks to the arrival of the burners (which had very advanced digital technology), a compact disc with the same sound quality as the original disc could be copied at a low cost, which consequently brought a threat to the traditional model of the record business. (Ochoa, 2003, p. 21)

At the end of the seventies, portability and the new facilities brought by the creation of the cassette and the walkman were the new protagonists of the music industry. These inventions allowed users to listen to their favourite songs with greater comfort. Gradually, thanks to these portable devices, the practices of listening to music were changed, turning them into a mobile experience. (Yudice, 2007, p. 47)

In 1998 Diamond Multimedia created the Rio PMP 300, a small portable device, the size of a cassette, with the ability to store mp3 song formats. The Rio PMP 300 revolutionized the recording industry, since it went from listening to a physical compact disc to listening to digitized immaterial files, in order to have greater functionality in the experience of listening to music. (Moreau, 2013, p. 24)

In October 2001, the iPod was invented, a device created by the computer company Apple, a company that created the digital music platform iTunes in the same year, which was very successful in the market. With this, an alliance was established between the digital technology sector and the recording industry. The creators of the iPod were Steve Jobs, Phil Schiller and Jon Rubinstein, who criticized the operation of the Rio PMP 300 and therefore decided to launch an improved product (Isaacson, 2011, p. 483).

Estela Civano (2003) affirms: "since 1999, pushed by the computer manufacturing companies, CD readers began to reach the markets with the additional capacity to record". (pp. 3-4)

The advancement of mobile technology and the ease of access to formats such as mp3 have been a significant scientific development in the history of the recording industry. Regarding this, Pablo Pucci Del Río (2008) points out: "regarding the digital area, it can be affirmed that the greatest revolution in the way people listen to music, since the Sony Walkman in the eighties, corresponds to the iPod of Apple". (p. 87)

Digital technology innovation has been made possible through cooperation between record labels and the telecommunications sector. With these cooperations, the development of new business models for mobile phone companies was achieved. Martín Raposo (2008) alludes to this development in his work, "New look on the music industry":

> The most recent changes, mainly related to cellular telephony and its possibility of downloading music files in a short time, either to listen to it or to use it to personalize the device, allow us to imagine a growth scenario for the industry. (p. 1)

Jonathan Benassaya and Daniel Marhely created in 2006 a platform of French origin called Deezer, which allowed users to easily access a catalogue of thousands of songs, via cell phone or computer, through a free plan with advertising or a service Premium without advertising with a value of 7 to 15 dollars per month, depending on the country where the user is located. (Arango, 2016)

Soon other streaming platforms similar to Deezer were born, such as Spotify. A digital music platform created in Sweden in 2008, by Daniel Ek and Martin Lorentzon. Spotify brings with it new functions: it offers the possibility of creating personalized playlists which can be shared through social networks, meet new musical trends and consult biographies of favourite bands and artists. (López, 2014, p. 57)

Thanks to these streaming services, access to music were enabled from any mobile phone, paying a monthly fee through the cell phone bill. In the same way, these advances contributed to the progress of digital technology and electronic commerce, since in Latin America most people do not have credit cards or do not choose to make payments with their cards for fear of becoming victims of scams or robberies. (Cobo, 2008, p. 6)

Then, digital technology transformed the traditional business model in the record and music industry, completely changing the way music is distributed and produced in record companies. Today with the help of telecommunications, the way of listening to music has been improved, making it reach any corner of the planet. With the different technological advances, already mentioned, it was possible to provide more

magnificent entertainment to users, allowing them to interact with their mobile devices and listen to their favourite music at any time.

2. COPYRIGHT AND RELATED RIGHTS IN THE MUSIC INDUSTRY

The concept of copyright and its classification, in the same way, we will present each of the rights that the different types of authors have in the Ecuadorian music industry. Following is a brief definition of related rights, this will help us later, to determine the degree of affectation or protection of copyright for musical works distributed in digital media. Likewise, copyright is a legal area that, through a set of norms, protects the rights of creators of artistic and literary works by recognizing a series of personal and patrimonial prerogatives called moral and patrimonial rights. Respectively. (Martínez, 2006)

The composers-composers of a musical track have a variety of copyrights that include both the heritage sphere and the moral aspects of these rights. By economic rights, we understand those by which the authors can economically exploit their work. Due to the patrimonial content of these rights, the composer-authors can assign, transfer, license, and others. The ownership of these in whole or in part, according to the will of the rights-holder. (Martínez, 2006)

Following the Ecuadorian Intellectual Property Law, better known as INGENIOS (2016), regarding the regulation of economic rights, the author of the work, has the following rights:

> 1. The right of reproduction of the work: It is a right employing which the authors can authorize or prohibit the fixation of a work in material support; as well as making copies of this work in whole or in part, whether by any physical or digital means.

2. The right of distribution: It is the right of the author-composers to authorize or prohibit any type of exploitation of the work, whether through sale, rental, leasing or any other way by which copies are distributed. of the work.

3. The right of public communication: It is the right of the authors to carry out, authorize or prohibit any type of disclosure of the musical work to a plurality of people gathered or not in a specific place without the prior non-existence of the distribution of copies.

Likewise, in the law mentioned above, various economic rights are granted to the author, such as:

1. The right of paternity: It is the right of the author-composer to always and at all times be recognized as the author of the work. Even when a work is known to the public, the authorship of the person who created it must be identified in the way the author estimates, either through its name or pseudonyms.

2. The right of integrity: It consists of the authority that all authors have that their work is not deformed or altered, in such a way that it affects their interests and reputation.

3. The right of unpublished: The author and composer's right to keep his work unpublished, that is, not to make his work known to the public.

4. The right of modification: Once the work has been published, the author has the right to make changes that he considers relevant. In this case, the author must pay the publisher or producer the costs and losses caused by the modification of the work.

> 5. The right of withdrawal or withdrawal: It is the right of the author to withdraw his work from circulation at any time or suspend its use. Here, in the same way, as in the case of modification, the author must indemnify the publisher or producer for the losses caused by the withdrawal of the work from the market. (Ingenios Code, 2016)

On the other hand, related rights are rights parallel to copyright and refer to the protection of artists, performers and performers concerning their activities. In some countries such as the United States and England, they are called "Related Rights" or similar rights, while in places like France they are called "Droits Voisins" or neighbouring rights. (Ficsor, 2002)

Altamirano (2008) notes that:

> It is essential to explain that copyright belongs to the creator of the musical work. They have the exclusive right to restrict the reproduction of the work, but they can license, transfer or sell part or all of it. It has led to the formation of companies that collectively collect and distribute rights through the application of network economies. Revenue is distributed to agents who are entitled to obtain agency rights, and an agreement is signed with a foreign copyright collection association to obtain locally obtained royalties.

Copyright is relevant to have mastery of the creation of the musical work; without these rights, the creator cannot obtain benefits, whether thoroughly artistic or economic from its creation. These rights are protected by the Ecuadorian government in order to guarantee that whoever created the music track can claim their rights if third parties appropriate or obtain economic benefits from the work.

3. SUBJECTS OF LAW IN THE MUSICAL INDUSTRY

In the music market we have multinational companies that are located around one of the most lucrative and fast-growing entertainment businesses in the world economy, these big companies are known as “the big four”, and they lead above 70% of the global market of the music industry. In comparison, the other independent companies reach 28% of this market. These large multinational companies are Universal Music Group with 26%, Sony-BMG Music Entertainment with 22%, EMI Group with 13% and finally Warner Music Group with 11%. (Altamirano, 2008)

However, despite their importance in being important in the global context of the music industry, record companies are not the only players in the music market. The other subjects of rights in the industry are among others the manufacturers of music equipment, the organizers of musical concerts, each with their contribution and in search of their benefit, which, as in all industries, are geared to give movement and generate wealth. (Altamirano, 2008)

On the other hand, the music industry is developed with various agents under contractual relationships that grant legal certainty, protecting artists and other holders from improper exploitation by third parties in an industry that is increasingly diverse and evolving. The contractual relationships typical of the music industry revolve around two underlying contracts: the one for music publishing and the one for inclusion in the phonogram, without taking into account the service provision contracts, which could be concluded between the artist’s manager and a promoter. concerts, which will serve as a guideline for the regulation of commercial relations between the subjects of law. (Álvarez, 2014)

These legal acts must be valid in all contracts, and are mandatory under the principle of “pacta sunt servanda”

since the agreements reached by the parties must be clearly defined in aspects related to the contractual object, the terms of fulfilment of the benefits and the affectation of the economic rights involved. (Ríos, 2011)

There is a figure in charge of protecting the rights of authors such as music publishers. The work of these entities is to monitor and protect intellectual property rights. One of the main functions of music publishers is to claim copyright income that may not have come to the creator of the musical work. In this transfer of economic rights, the publisher will be responsible for the commercialization of the works. Thus, it is this entity that authorizes the record labels to take care of aspects such as recording, production or distribution. (ICAM, 2008)

The work of these companies is administrative tasks such as royalty control and payment to the authors. In this way, the artist keeps all his copyrights under guardianship to ensure the independence and integrity of his works. (ICAM, 2008)

According to Álvarez (2014), the agents that can potentially intervene in the chain of negotiations in the music industry are:

> 1. Author and composer: Both subjects are protected by copyright, however, for practical purposes, it is understood that the author of a song is the one who writes the lyrics, while the composer is the one who composes the melody. These two qualities can come together in one person without any problem, but it is common to find cases where the author of work needs the help of other individuals who assist him and contribute to the creative enrichment of it. (Ríos, 2011, p. 56)

2. Performer: The performer is the lead musician who sings or plays the work on either a phonogram or live, while the performer is the accompanying musician.

3. Manager: Manager, or representative, is the person who controls the professional activities of the artist, that is, who is in charge of advising, supervising and managing the business. One of its most relevant functions is the negotiation of contracts in which the economic rights over the works could be affected.

4. Music editor: It is the person who, through an editing contract, is in charge of managing the economic exploitation of the rights of the author or composer, that is, of marketing the works and paying the royalties

5. Producer of phonogram: The producer, or production company, is the one who has the recording of the songs under his administrative and financial direction and has the resources to produce the phonogram or master.

6. Broadcasting organizations: They are the radio or television companies that emit and broadcast signals at a distance, destined for the public, that may contain images, sounds or both.

When creating and producing musical work, various subjects contribute to its creation. Each person, involved in the creation of the musical work, plays a fundamental role to shape the track ultimately, either producing the song's melody or singing it. These people are protected by law to receive benefits for their contribution to the song, either in the work of creation, production or interpretation of the musical work.

4. LEGAL PROTECTION OF THE AUTHOR IN THE DIGITAL ENVIRONMENT

Musical tracks have characteristics corresponding to a private good, so these must be protected so that they are not susceptible to plagiarism or copying, and thus prevent third parties from obtaining benefits that can be perceived by publishing or selling musical works. Copyright is protected in a large number of countries around the world in order to protect human ingenuity and creativity. (Altamirano, 2008)

However, technological advances make copyright protection more and more complicated, the rapid proliferation of the Internet and the new digital age make it necessary for the recording industry to transform and seek to develop business models that facilitate the commercialization of its products. agile way. (Rodríguez, 2019)

Achieving the perfection and implementation of an adequate legal framework on copyright in each of the countries and also with both international agreements are very important in the digital scene because the Internet allows mobility across borders easily of content. (Flores, et al., 2018)

The Organic Code of the Social Economy of Knowledge, Creativity and Innovation is the legal framework that empowers the Ecuadorian State to assume the defence and protection of intellectual rights. This code, better known as INGENIOS, encourages investment in research and development regarding the protection of intellectual property rights. (Espinel Pacheco, 2017)

Article 559 of the Organic Code of the Social Economy of Knowledge, Creativity and Innovation (2016), establishes that: "The competent national authority in matters of intellectual rights shall exercise, ex officio or at the request of a party, inspection, monitoring and sanction functions to avoid

and suppress infringements of intellectual property rights." It is the first real mechanism to sanction infringers who violate copyright. It is a process to determine whether or not there is an infringement of these rights and issue the stipulated sanction through resolution. (Rubio Tigasi, 2019)

In the same way, article 256 of the Organic Code of the Social Economy of Knowledge, Creativity and Innovation (2016), stipulates: "Whoever exploits a work, performance or execution, broadcast or phonogram must pay, as compensation, a surcharge of fifty for per cent on the rate, calculated for the entire time that the exploitation has been carried out." Here you can see another protection mechanism regarding copyright, which indicates that the person or group of people who violate and exploit copyright must financially compensate the owner of the right with fifty per cent of the fee throughout the estimated time of exploitation of the work. (Rubio Tigasi, 2019)

Ecuador has regulations that guarantee the protection of copyrights. However, technology is advancing rapidly, which will always require laws that adequately protect the author. Laws must evolve and transform the landscape of the music industry, in the digital environment, in order to ensure copyright.

5. CONCLUSIONS

Music is the primary form of entertainment worldwide. Music is found in each country since it has been captured from its ancestral roots and is a characteristic of many cultures originating in the world. With advances in technology, the traditional model of the music and record industry was utterly transformed. It made it easier for the different musical genres to reach different parts of the world, making it possible for a wide variety of people to listen to them.

The Internet is a tool that offers better business opportunities for the music industry, especially for independent artists who are beginning to stand out in the media for themselves. Thanks to the digital platforms that have been created and have evolved, the distribution of music has been facilitated, through the new business model that is the streaming service or through online downloads. Achieving that different musical styles and artists increase their audience. Each person involved in the musical creation process has a variety of rights and obligations according to how significant the contribution was in creating the song. Each of these people is protected by law in order to safeguard their rights since they are in a contractual legal relationship.

The Ecuadorian music industry does not have a more significant impact internationally, even though there are many artists with enough talent to develop within this medium. What happens is that in the country, there is no greater motivation for artists to develop in the industry. The country has the optimal regulations to protect copyrights in the field of music creation, but artists are not motivated to fully function in this environment.

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Juan Sebastián Aguirre Navarrete: Independent legal researcher

Email: juansebas131201@hotmail.com

City: Quito

Country: Ecuador

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